TEMPORARY MARRIAGE

(MUT'A)

IN ISLAMIC LAW

Sachiko Murata

Temporary Marriage in Islamic Law

Al-Serat

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The present work is based on an MA dissertation completed in 1974 under the direction of Professor Abu 'l-Qasim Gurji of the Faculty of Theology at Tehran University (most of the Persian text was published under the title Izdiwaj-i muwaqqat: (mut'a-sigha) [Tehran: Hamdami, 1358/1979]).

Introduction

Though there are important differences between Twelve-Imam Shi'ism and Sunnism on the level of the principles of the religion *(usul al-din),* on the level of the *sharia* and *fiqh* or jurisprudence there are surprisingly few places where Shi'i or 'Ja'fari' law differs from all four Sunni schools, the Hanaf'i, Hanbali, Maliki, and Shafi'i. Perhaps the most important difference occurs in relation to the institution of *mut'a,* or 'temporary marriage'. The Sunni authorities agree that *mut'a* was permitted by the Prophet at certain points during his lifetime, but they maintain that in the end he prohibited it completely. In contrast the Shi'is maintain that the Prophet did not ban it, and they cite numerous *hadith* from Sunni as well as Shi'i sources to prove this. Having established its legality, they then devote tremendous care and attention to defining its legal status and all the rules and regulations connected with it.

One major purpose of the present study is to trace the origin of this divergence between Sunni and Shi'i law by going back to the sources and arguments on both sides. A second purpose is to describe the legal situation of *mut'a* in Shi'ism. In order to do this, it is first necessary to understand the rules and regulations that define marriage itself, since all the discussions of *mut'a* take place within this context. Hence Chapter One describes the 'pillars' and 'conditions' of marriage according to the five schools of law, though in a manner which is by necessity truncated and which makes no attempt to give a thorough presentation of all the different opinions. Chapter Two discusses the 'four pillars' of *mut'a* and Chapter Three its 'statutes'. Once the nature of *mut'a* and its structural relationship to permanent marriage is understood, the debates concerning the legitimacy of *mut'a-summarized* in Chapter Four--can be better understood.

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As for the abuses of *mut'a* that have occurred in certain times and places, in large measure these can be traced to the refusal of people to observe the letter of the law; perhaps those who established *mut'a* had too high an opinion of human dignity, self respect, and fear of God. They no doubt thought that the Prophet's saying: 'Every religion has its special character trait, and the special character trait of my community is shame *(haya')* would continue in effect until the end of time. At least *mut'a* can be said to provide a legal structure which, when observed, prevents most of the well known problems and abuses connected with unregulated sexual relationships.

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Permanent Marriage

IN ISLAM the word most commonly employed for marriage is *nikah*, which means literally 'sexual intercourse'. As a legal term it denotes the situation resulting from a particular contract, entered into by a man and a woman, by which sexual intercourse between them becomes legitimate in the eyes of God and society. The only other mode of legitimizing this sexual relationship is by a man's purchasing a female slave, but this is a complicated discussion that cannot concern us here.

Marriage as a legal institution is defined and described in terms of a number of 'pillars' *(arkan)* and 'statutes' *(ahkam)*, which are discussed in what follows. The pillars are those elements of the marriage contract whose absence nullifies the contract. The statutes are the rules and regulations that govern the contract. A brief account will also be given of certain other legal points relating to marriage, namely divorce, the waiting period, forswearing, sworn allegation, *zihar*, and inheritance.

I. The Pillars Of The Marriage Contract

Marriage has a set number of pillars, two according to the Shi'is, three according to the Malikis and Hanafis, and four according to the Hanbalis and Shafi'is. All schools agree on the first two pillars, 'formula' and 'persons'.

A. The Formula (sigha)

Marriage is legalized by a contract ('*aqd)*, which, like all other contracts in Islam, consists of a declaration *(ijab)* and an acceptance *(qabul)*. The woman declares that she is entering into a relationship of marriage with the man, and he accepts her as his wife.

The schools differ as to the exact words that may be employed in the woman's declaration. The Shafi'is and Hanbalis hold that a formula derived from the words 'I have married you' *(ankahtu-ka)* or 'I have espoused you' *(zawwajtu-ka)* are valid. The Malikis maintain that if the amount of the dower to be paid to the wife (see *IlA* below) has been specified, the woman may also say 'I give myself to you' *(wahabtu-ka)*. [1] The Shi'is do not include the verb 'to give', but they add the formula, 'I surrender myself to your pleasure' *(matta'tu-ka)*. [2] The Hanafi school is the freest in respect of the formula, allowing any number of expressions to be employed, even certain indirect formulas.

All schools agree that the man may show his acceptance by employing any word which denotes his satisfaction with the contract.

The Hanbali, Maliki, and Shi'i schools hold that the verbs for both declaration and acceptance must be in the perfect tense. According to the Hanafis, the present tense may be employed as long as what is meant is directed toward the future, i.e., does not denote the seeking of a promise of marriage; [3] according to the Shafi'is, the present tense may be used if it excludes the possibility of being interpreted as a promise of marriage, e.g., by adding the word 'right now' *(al-an).* [4] All agree that both declaration and acceptance must be uttered at a single session. It is not necessary for the declaration to precede the acceptance, except according to the Hanbalis. [5] A person who knows Arabic must pronounce the formula in that language, but those who do not know Arabic may employ equivalent terms in their own language. A mute may employ sign language.

B. The Persons (mahall)

The man and woman must be free of all *shar'i* hindrances to their marriage, as explained below. The identity of the spouses must be clearly specified. Thus, for example, if the guardian (below, C) should say: 'I give one of my two daughters to you in marriage', and the man should accept, the contract is invalid.

A woman may not marry a husband who is not 'equal' *(kafa)* to her. According to the Shi'is, this means only that the woman's husband must be a Muslim. [6] The Sunni schools add equality in terms of various social considerations. Not only must the man be a Muslim, he must also have a social standing at least equal to the woman's. In other words, she may not marry anyone below her rank in society, though a man may do so. 'Equality' here is defined in terms of a number of factors which differ slightly among the four schools. The Hanafis mention Islam, lineage, profession, liberty (as opposed to slavery), piety, and property. The Shafi'is list lineage, religion, and profession, differing only slightly in the words employed from the Hanbalis. The Malikis mention piety and freedom from physical defects detrimental to marriage. [7]

A man and woman may be forbidden from marrying for several reasons:

1. Blood relationship *(qaraba).* A man may not marry the following women: (a) His mother or any of his grandmothers; (b) His daughter or granddaughters, no matter how far removed; (c) His sister; (d) His nieces, his aunts, or his great aunts.

2. Relationship by marriage *(musahara).* A man may not marry: (a) The mother or grandmothers of his wife; (b) The daughter, granddaughter, etc., of a wife with whom his marriage has been consummated; (c) The ex-wife of his son, grandson, etc.; (d) The ex-wife ofhis father, grandfather, etc.

3. There are certain women whom a man may marry singly, but not at the same time. These are (a) two sisters, and (b) a woman and the sister of her mother or father. In the second case, the Shi'is take exception to the four Sunni schools by saying that if the aunt agrees to share her husband with

her niece, the contract is valid. [8]

Except for the daughter of his wife, in the three other instances of relationship by marriage, the women become forbidden to the man as soon as the marriage contract is concluded; consummation of the marriage is not necessary. But if a man wants to marry the daughter of a wife with whom he has not consummated his marriage, he can do so if he first divorces the wife. Once the marriage has been consummated, the wife's daughter is forbidden to him forever, whether or not the marriage contract is valid. If a man should marry both a woman and her daughter or two sisters in a single contract, both marriages are invalid. In both cases, should he first marry one and then the other, the first contract is valid and the second void.

The schools of law differ as to what exactly establishes the unmarriageability of a woman as the result of a relationship by marriage. For the Hanafis, unmarriageability is established by a valid marriage contract, sexual intercourse in whatever context (i.e. whether as the result of a valid contract, an invalid one, or fornication), love play, or looking at the private parts of a person of the opposite sex. [9] The Shafi'is hold that unmarriageability is established only by a valid marriage contract or by the consummation of an invalid marriage contract. They do not consider any other factors, such as fornication or love play, as sufficient to establish unmarriageability. [10] The Maliki position is the same as the Hanafi, except in the case of fornication; like the Shafi'is, the Malikis hold that no honour or respect can be paid to fornication. [11] In the Hanbali view an invalid contract, like a valid one, results in unmarriageability, as does sexual intercourse. [12] The Shi'is hold the same position as the Shafi'is except that the opinion of the *'ulama's* split on fornication; one group says that it results in unmarriageability, another group says it does not. [13]

4. Foster relationships because of suckling *(rida')*. In establishing unmarriageability, a foster mother who suckles an infant is considered exactly as the infant's real mother, provided that all the *shar'i* conditions for this relationship are fulfilled, as detailed below. In other words, the children of the foster mother are considered as the child's siblings, and all of her other relatives are considered exactly as if they were truly the child's relatives by blood or marriage.

a.

The Shi'is and Hanbalis hold that the mother's milk must have been the result of pregnancy from marriage. [14] The Shafi'is hold that the mere physical possibility of pregnancy is sufficient. Thus, for example, if a married nine year old girl should have begun menstruation and her breasts produce milk, and if she should provide milk for a foster child, the *shar'i* foster relationship is established. [15] The Malikis and the Hanafis maintain that it is only necessary for the woman to have given milk for the relationship to be established; it makes no difference if she should also be an unmarried virgin, or if she is too young to marry or too old to bear children. [16]

According to the Hanbali and Shafi'i schools, if the foster mother should have become pregnant through fornication, the relationship of unmarriageability is established only with the mother's blood relatives, not with the father's, since he has no legitimate relationship with the mother. The Hanafi and Maliki schools say that unmarriageability is established also with the father's relatives. [17] The Shi'is hold that in the case of fornication no relationship of unmarriageability is established whatsoever, since fornication deserves no respect. [18]

c.

According to four of the schools, the foster child must have been suckled before it reaches two years of age for unmarriageability to be established. The Malikis set the age at two years and two months. [19]

d.

According to all the schools, the milk must have entered the infant's stomach.

e.

The Shi'is hold that the infant must have suckled at the breast of the foster mother. Hence, if the milk is placed in a container and fed to the child, the foster relationship is not established. [20] The Sunni schools hold that the means of drinking the milk is irrelevant.

f.

The schools differ as to how many times milk must be drunk. The Shafi'i and Hanbali schools hold that the infant must suckle at least five times. [21] The Shi'is hold that it must suckle over a period of twenty-four hours or at least fifteen times, and each time it must drink a quantity of milk that would customarily be called a 'feeding'. [22] According to the Hanafis and Malikis, a single act of suckling, even if the infant drinks only one drop of milk, is sufficient to establish the relationship. [23]

g.

The Shafi'is and the Shi'is add that the foster mother must be alive when the milk is drunk. [24] The other schools hold that even if for some reason an infant should suckle at the breast of a corpse, the foster relationship will be established. [25]

5. Religious difference. A woman may not marry a non-Muslim. In Sunnism, a man may marry a woman who is one of the 'People of the Book' *(ahl al-kitab,* i.e., Christians, Jews, and other religions with revealed scriptures). But in Shi'ism a man may not contract a permanent marriage with a non-Muslim, though he may marry one of the People of the Book temporarily. [26] If either

of the spouses should become an apostate, the marriage is automatically annulled.

6. Maximum number of wives. A man may not have more than four wives at one time. If a man should divorce one of his wives, he cannot remarry until her waiting period (below, IV) is completed, unless the divorce should be of the irrevocable type *(ba'in*, see below under III).

7. Divorce. If a man should have divorced his wife irrevocably, she is forbidden to him forever, unless she should marry another man and obtain a divorce from him. Once the woman's waiting period has expired, she may remarry her first husband. The woman's husband is known as the *muhallill*, 'he who makes [marriage to her first husband] lawful'. The marriage with the *muJ:tallil* must be consummated. [27]

8. Sworn allegation. Having annulled his marriage through 'sworn allegation' *(li'an*, below, VII), a man may never remarry the woman.

C. *Guardianship* (wilaya)

The legal guardian in the marriage contract may be the father, the father's father (Hanafi, Shafi'i, Shi'i), the executor of the father's will concerning the marriage (w*asi)*, the governor of the town *(hakim)* in case of the nonexistence of the others (Hanbali), and the owner of a slave (Maliki). The mother has no guardianship except in the Hanafi school, which holds that if there is no close male relative, close female relatives may assume the guardianship and conclude the marriage contract. [28]

In the Maliki and Shafi'I schools, the participation of the legal guardian is one of the pillars of the marriage; in the Hanbali school it is a condition *(shart*) of the contract, which means that if the contract is concluded without the guardian, it will be valid only on condition that the guardian gives permission afterwards. [29] Hence in these three schools the woman does not have the right to conclude a marriage contract without the participation of her guardian. [30] In the Shi'i and Hanafi schools the presence of the guardian is required only at the marriage contract of a girl not of age, that is, one who has not yet reached puberty *(saghira)*, or of an incompetent or insane girl or woman of age. In both these schools a girl who is physically mature may marry whomsoever she wishes, and the validity of the contract is not conditional upon the presence of the guardian. [31] However, the Hanafis add that since social equality *(kafa')* is a condition for a valid contract, a guardian may annul a contract concluded by a woman on her own behalf with an unequal man. [32]

In the Maliki, Hanbali, and Shafi'i schools, the guardian may give a virgin in marriage without her consent, whether or not she is of age. But a woman or girl who has been married before may not be given in marriage without her permission. [33] The Hanafis and Shi'is hold that only a girl not of age may be given in marriage without her consent. [34] The Shafi'is add here that if an underage girl has already been married, she may not be given in marriage again until she comes of

age. [35]

The regulations of guardianship also apply to boys not of age *(saghir)* and mentally incompetent men. [36]

D. Witnesses (Shahid)

The Shafi'i, Hanbali, and Hanafi schools hold that the presence of two witnesses is a pillar of marriage and that without their presence, the contract is invalid. [37] The Malikis hold that the presence of two witnesses is necessary at the time of the marriage's consummation *(dukhul)*, but not during the contract, when their presence is merely recommended. [38] The Shi'is maintain that the presence of one or more witnesses is not a pillar of the contract, so a man and woman may conclude a contract secretly if they so wish. [39]

II. The Statutes Of Marriage

A. The Dower (mahr)

Whenever a man marries a woman, he must give her a dower in return for the sexual gratification he is to receive. The dower must consist of a specified amount of property, cash, or profit. It must be ritually pure and owned by the husband. All schools agree that the dower does not have to be mentioned in the contract. If it is mentioned and does not fulfill the conditions required for dowers, the contract is valid but the dower must be corrected.

There are two kinds of dower. The 'specified dower' *(al-mahr al-musamma)* is one upon which the man and the woman agree. The 'normal dower' *(a!-mahr a!-mathal)* is what the woman receives if she cannot come to an agreement with her husband over the specified dower, or if for some reason the specified dower should be invalid. The normal dower is the amount of property, in cash or kind, which other women of the same social status, age, beauty, etc., are receiving in the society of the time.

According to four of the schools, as soon as the marriage contract is concluded, the woman becomes the owner of the whole dower; the Malikis maintain that only one-half of the dower belongs to her at this point. [40] Should the wife demand the dower from her husband immediately, he must pay it to her; but if he should divorce her before consummation and she has not yet taken the dower, he only has to pay her one-half.

In all schools, consummation of the marriage or the death of one of the spouses necessitates payment of the full dower. The Malikis add that if the wife should live with her husband at least one year, there being no hindrance to consummation of the marriage, he must pay the full dower. [41] The Hanafis maintain that it is sufficient for the man to be alone with his wife on one occasion when there is no hindrance to consummation. [42] According to the Hanbalis, being alone with the wife, love play, and seeing her private parts are all sufficient cause for the payment

of the whole dower. [43]

Before consummation of the marriage, payment of all or part of the dower may be nullified for the following reasons: I. One-half is nullified through divorce. 2. If the woman should become an apostate, she loses the whole dower. 3. If the man should become an apostate, the marriage is void, but he still must pay one-half the dower. 4. If the man or woman should annul the marriage because of physical disability or deception by the partner, she forfeits the whole dower; however, the Shi'is hold that if the woman should annul the marriage by reason of the man's impotence, she will be entitled to one-half the dower. [44] 5. If a man and woman should suddenly become forbidden to each other through the establishment of some relationship, e.g. a foster relationship, where the woman is not at fault, she receives one-half the dower; if she is at fault she loses all of it.

According to the Maliki, Hanbali, and Shi'i schools, if the marriage contract should be invalid but copulation takes place, the woman is entitled to the specified dower. [45] The Shafi'is hold that in such a case, she receives the normal dower. [46] The Hanafis rule that she will receive whichever of the two dowers is less. [47] In a case of 'mistaken intercourse' *(waty a!-shubha)*, where copulation takes place because the man and woman mistakenly believe themselves to be husband and wife, the woman is entitled to the normal dower.

The woman may refrain from sexual intercourse as long as she has not received the dower. In such a case the man may not claim conjugal rights unless it was explicitly stated in the marriage contract that the dower would be paid at some later date. But if the woman should accept intercourse before receiving the dower, from then on she may not refuse her husband, unless it is proven that he has no ability to pay the dower; here the Shi'is take exception, holding that once the marriage is consummated, the wife may not refuse intercourse because of the husband's inability to pay the dower. [48] The Hanbalis, Shafi'is, and Malikis say that if the husband's inability to pay is proven before consummation, the woman may annul the marriage; with the exception of the Hanbalis, they hold that she may not do so after consummation, since her willingness to engage in sexual intercourse proves that she accepted the marriage's validity; the Hanbalis say the woman may annul the marriage even after consummation. [49] The Hanafis and Shi'is hold that the woman may not annul the marriage, but she may refuse to engage in intercourse. [50]

If the woman should decide to return part or all of her dower to her husband, he is then free from the obligation to pay it to her.

B. Support (nafaqa)

Once the woman has taken up residence with her husband, he must support her in a mode corresponding to the support received by her equals. Support includes such things as food, clothing, shelter, and other necessities. Payment of the dower becomes incumbent on the husband as a result of the marriage contract, but payment of support only becomes incumbent as a result of the contract *and* the wife's obedience to her husband. If the wife does not obey her husband, he is

not obliged to support her.

Here it should be kept in mind that in Islamic society a wife must 'obey' her husband only within the *shar'i limits*, which is to say that the woman obeys the man on condition that he is obeying God. Should he tell her to do something not sanctioned by the *sharia* her duty is to follow God, not her husband.

A woman who is in the 'waiting period' (below, IV) after having been divorced, but not irrevocably, by her husband, is entitled to support, since she is still his wife. A woman who is in the waiting period of irrevocable divorce must be supported only if she is pregnant.

According to the Hanbalis, Malikis, and Shafi'is, if it is proven that the man does not have the ability to support his wife with the necessities of life, she has the right to seek to annul the marriage through a *qadi (shar'i* judge). The Hanafis and Shi'is maintain that a woman not adequately supported by her husband may complain to a *qadi*, who must then take whatever action he thinks necessary to rectify the situation, e.g., pursuading the husband to take employment. [51]

C. *Annulment* (faskh)

Any time a spouse has certain specified physical or mental disabilities which make continuation of the marriage difficult, the other spouse may annul the marriage. These disabilities vary according to the different schools. All schools except the Hanafi list insanity, emasculation, and impotence for the men, and insanity, leprosy, and a blocked vagina for the wife; each of them except the Hanafi then adds various other disabilities of the same sort. In the Hanafi school the wife has the right to annul the marriage only for the three grounds listed, while the husband has no grounds for annulment on the basis of disabilities. [52]

The spouse who discovers a disability in the other spouse must exercise the right of annulment immediately or lose the right. Similarly, if there was knowledge of the disability before the marriage, the marriage is in effect an expression of satisfaction with the disability, so there is no grounds for annulment; however, the Shafi'is and Malikis hold that a woman's knowledge of the man's impotence before marriage does not effect her right to annul the marriage. [53] If the annulment takes place before consummation, the wife receives no dower; if the marriage has been consummated, she receives the full dower .

All schools agree that disabilities which existed before the marriage are grounds for annulment, but there is a difference of opinion about disabilities which appear after the marriage. The Malikis hold that in the case of such later disabilities, the wife-but not the husband-has the right to annulment before consummation, so long as the husband was healthy before the marriage; however, in the case of insanity and leprosy, the husband has one year in which to undergo treatment, If he is not cured in one year , the annulment takes place, [54] All schools agree that a full year is needed before the man can be judged impotent; after a year, the annulment takes place,

The Shafi'is and Hanbalis maintain that both spouses retain the right to annulment, whether before or after consummation, The Sunni schools agree that the annulment should be declared by a *qadi*. The Shi'is say that disabilities occurring after marriage do not establish grounds for annulment, with the exception of the husband's insanity, which is grounds for annulment even after consummation; as for impotence, the wife should seek the *qadis* pronouncement of the one year period, but then she herself annuls the marriage. [55]

III. Divorce (*Talaq)*

The pillars of divorce differ according to the schools. The Hanafis and Hanbalis hold that there is only one pillar, i,e., the formula through which it takes place. In the view of the Shafi'is and Malikis, the pillars are (I) the existence of the husband and the wife, (2) the formula of divorce, and (3) the intention. [56] The Shi'is maintain that the pillars are (1) the husband and wife, (2) the formula, and (3) two witnesses, [57] The husband may divorce the wife, but not the reverse. In contrast to marriage, the wife's consent is not necessary.

The man must be in possession of his rational faculties, have reached physical maturity (except in the Hanbali view), and be acting of his own free will (except according to the Hanafis). The Hanbalis maintain that a youth who has not reached puberty but who understands the meaning of divorce and its consequences may divorce his wife of his own accord; the Hanafis say that even if the formula is pronounced under duress, it is still valid. [58] To the views shared with the other schools, the Shi'is add that the husband must pronounce the formula with the intent of divorcing his wife, although unlike the Shafi'is and Malikis, they do not make this a pillar of divorce. [59]

The wife must be a free woman, a permanent wife, and faithful, since there is no divorce in the case of a slave woman, a temporary wife (in Shi'ism), or an adulteress.

The man must employ words in the formula that denote divorce directly or indirectly, though the Shi'is hold that the word 'divorce' itself must be employed. A dumb man may divorce his wife through gestures. The Malikis and Hanafis hold that a man may divorce his wife in writing.

The formula must be pronounced three times in the manner described below.

Divorce has two general categories depending on the time the man chooses to pronounce the formula: 'traditional' *(sunni)* divorce, which is permitted, and 'non-traditional' *(bid'i)* divorce, which is prohibited.

Whether divorce is traditional or non-traditional depends upon the woman's state of ritual purity when the man pronounces the formula and his manner of reciting the formula. During menstruation and confinement after childbirth a woman is ritually impure, and she does not become pure again until her situation changes and she performs the major ablution *(ghusl)*. For the

traditional divorce to take place, she must be in a state of ritual purity and her husband must not have had sexual intercourse with her during her last menstrual period (this condition is added for reasons of precision, even though sexual intercourse during that time is forbidden) or from the time she performed the major ablution after her period or confinement, According to the Shi'is, if the woman is in the state known as *mustaraba* (i,e., she is approaching menopause, her menstrual period is delayed, and she mayor may not be pregnant), the husband must wait three months in order to determine her condition, and only then can he divorce her. [60] The man must pronounce the formula on three separate occasions separated by a specific period of time, as explained below.

Although non-traditional divorce is forbidden with certain exceptions in the view of some schools, it may still take place. It is divided into several kinds: A divorce given while the woman is in (I) her menstrual period or (2) confinement, (3) A divorce given by pronouncing the formula three times on a single occasion; here the Shafi'is maintain that this form of divorce is permissible. [61] (4) Divorce when the woman is ritually pure after menstruation, but sexual intercourse has taken place; the Malikis hold that this form of divorce is not forbidden, only reprehensible *(makruh*).

In spite of the fact that non-traditional divorce is forbidden, the Sunnis hold that the formula pronounced under any of the above conditions is still valid. However, the Hanafis and Malikis say that the man must return to his wife and consider himself as her husband; if he still desires to divorce her, he must wait until she has purified herself after her second menstrual period from the time he originally pronounced the formula and then pronounce it once more. If the man does not return to his wife, the divorce is valid, but the man has then definitely sinned against the *shari'a;* however, no punishment is to be inflicted in this world before the Day of Judgment, [62].

The Shi'is maintain that non-traditional divorce is invalid, with the exception of the form in which a man pronounces the formula three times at once; such a divorce is then irrevocable. [63]

In certain cases, the temporal categories delineated by 'traditional' and 'non-traditional' do not apply. Thus a man may divorce at any time a woman with whom he has not consummated the marriage, a girl who has not reached puberty, a woman who has reached menopause, and a pregnant wife. In three of the schools, these types of divorce are considered traditional, while the Shafi'is and Hanbalis hold that they are outside the classification. [64] According to three of the schools, divorce initiated by the wife *(khul'* and *mubarat*, discussed below), divorce as a result of 'forswearing' *(I'la,* below V), and divorce ordered by a *qadi* have no temporal conditions. The Malikis and Shi'is hold that these are types of traditional divorce with the same temporal conditions. [65]

For a divorce to become final, in most cases the man must pronounce the formula on three different occasions, as described below. Technically, his first and second pronouncements are also divorces, but they are 'revocable' *(rij'i).* Hence, divorce may be divided into the revocable and irrevocable *(ba'in)* forms. In the following cases, divorce is irrevocable:

I. The divorce of a wife with whom marriage has not been consummated.

2. The divorce of a wife who has not yet reached puberty.

3. The divorce of a wife who has reached menopause.

4. Divorce initiated by the wife *(khul'* and *mubarat*).

5. The third divorce after two revocable divorces.

Once an irrevocable divorce has taken place, a man may not remarry his wife unless she first marries another man and consummates the marriage; having been divorced irrevocably from her second husband, she may then remarry her first. The second husband is known as the *muhallil,* as mentioned above. In such a situation, it would be normal practice for some sort of agreement to be made between the wife and her second husband. However, it is not permissible for a condition of subsequent divorce to be entered into the marriage contract. Outwardly the contract must be the same as for any permanent marriage. [66]

A woman who has been revocably divorced keeps the status of wife, and the husband may return to her and have sexual intercourse with her if he so wishes. But according to the Malikis, he must make the mental intention of returning to her before doing so; and according to the Shafi'is, he must express the intention verbally to his wife. [67]

It is permissible to include a condition of divorce in the marriage contract in certain cases. Hence, for example, a wife may stipulate that if her husband should marry a second wife, she will have the right to be divorced.

Although only the man has the right to pronounce the formula of divorce, the woman may take the initiative in *khul'* and *mubarat.* These two terms are almost synonymous, but in the case of *khul',* the wife must have an aversion to her husband; in *muharat,* there should be mutual aversion. In each case the wife agrees to pay her husband a certain amount of property in cash or kind if he divorces her. According to the Shi'is, the amount in *muharat* must not exceed the amount of the dower, while in *khul'* there are no conditions on the amount, These divorces are irrevocable, except according to the Shi'is, who hold that during her waiting period the woman may take back her property from her husband, in which case he has the right to conjugal relations. [68] The Hanbalis maintain that *khul'* is a form of annulment, not divorce. [69]

Since these types of divorces are in reality a kind of contract, they require a declaration *(ijab)* and an acceptance *(qabul).* The woman must say something like: 'Divorce me in exchange for such and such', while the man must answer something like: 'I accept' or 'I divorce you'. The Sunnis hold that the husband may employ any number of words in the formula, such as 'divorce' or words derived from the same roots as *khul'* and *muharat.* The Shi'is say that the word 'divorce' itself must be employed. [70]

According to the Sunni schools, a third party may initiate a *khul'* divorce. In other words, he may offer the husband a sum in exchange for which the husband will divorce his wife. The Shi'is maintain that this is forbidden. [71]

The schools discuss in detail the nature of the property which may be exchanged in *khul'* and *mubarat*, differing on many minor points. In general it must be lawful and intrinsically valuable, like the property which constitutes the dower. If not, the divorce will be valid, but there is then a difference of opinion as to whether it is revocable or irrevocable.

IV. The Waiting Period *('Idda)*

When a woman is divorced or her husband dies, she must wait for a prescribed period of time before she can remarry.

If the woman's husband has died, the waiting period differs according to whether or not she is pregnant; if she is not, she must wait four months and ten days. Such things as her physical maturity, whether or not she has reached menopause, and whether or not the marriage has been consummated are irrelevant. If the woman is pregnant, according to the Sunnis her waiting period terminates when she gives birth to the child; according to the Shi'is, she must wait either four months and ten days or the term of her pregnancy, whichever is longer. [72] If a woman's husband should be away on a journey when she hears of his death, according to the Sunni schools her waiting period begins on the date of his death; the Shi'is hold that it begins on the day she receives the news. [73]

The waiting period for divorce differs according to circumstances and the views of the different schools. A woman with whom the marriage has not been consummated has no waiting period. A girl less than nine years old has no waiting period according to the Hanbalis and the Shi'is; but the Malikis and Shafi'is hold that if she was mature enough to participate in sexual relations, she must wait three months; the Hanafis hold that in any case her waiting period is three months. A woman who has gone through menopause must wait three months in the view of the Sunni schools, but the Shi'is say that she has no waiting period. A woman who menstruates and who is not pregnant must wait either three *tuhrs* (periods of purification after menstruation) according to the Shi'is, Malikis, and Shafi'is, or three menstrual periods according to the Hanafis and Hanbalis. A woman who is old enough to menstruate but who does not or who is in the state of *mustaraha* must wait three months. A woman who is pregnant must wait until she has delivered her child. [74]

V. Forswearing *(Ila')*

'Forswearing' means to swear an oath in God's name not to have sexual relations with one's wife, either absolutely, or for a period of more than four months. Since the *sharia* forbids a husband from refraining from sexual intercourse with his wife for more than four months, once the four months have passed, the wife has a valid reason to have recourse to a *qadhi*. If the husband should break the oath, he must pay the expiation *(kaffara)* set by the law for the breaking of an oath. If he

holds to his oath and the four months pass, the wife may go before a *qadi* and request that he clarify her marital situation. According to the wife's wishes, the *qadi* will either order the husband to return to his wife or to divorce her. If the husband is ordered to return to her but refuses, the *qadi* will then order him to divorce her. If he also refuses that, the *qadil* will grant her a revocable divorce. The Shi'is differ here by holding that the *qadi* does not have the right to grant divorce in the husband's stead; however, he can force the husband-by imprisonment or other means at his disposal-to take one of the two courses open to him, i.e., to return to her or divorce her. [75] The Hanafis say that once the period of the husband's oath comes to an end, the woman is divorced irrevocably, without any need for the husband's pronouncement of the formula. [76] The Shi'is hold that forswearing may not take place in the case of a virgin. [77] The Sunni schools disagree and add that if her husband divorces her, the divorce is irrevocable.

VI. *Zihar*

In pre-Islamic times the Arabs practiced a form of divorce which amounted to the husband's reciting the formula, 'You are to me as my mother's back *(zahr)'*, a practice referred to as *zihar*. Although Islam forbids *zihar* (cf. Qur'an 33:4, 58:2), if a man should recite this formula to his wife--or an equivalent formula, by substituting a reference to any other female forbidden to him-sexual intercourse with his wife is forbidden to him. Z*ihar's* conditions are the same as those of divorce; hence in Shi'ism two witnesses must hear the formula recited.

VII. Sworn Allegation *(Li'an)*

'Sworn allegation' is a procedure whereby a man may take his wife before a *qadi* and either accuse her of infidelity or deny his fathering her child. The man then pronounces this formula four times: 'I testify before God that I speak the truth concerning what I say about this woman.' The *qadi* will then counsel the man concerning the gravity of his accusation. If he should repent of his words, he will receive the punishment for false accusation (eighty lashes). If he maintains the truth of his accusation, he must repeat a second formula four times: 'God's curse be upon me if I am a liar'.

The judge then turns to the wife. She may either face the penalty for adultery (stoning to death) or repeat this formula four times: 'I testify before God that he is a liar'. The judge will counsel her concerning the gravity of falsely swearing before God. If she continues to maintain her innocence, she must pronounce a second formula four times: 'God's wrath be upon me if he is telling the truth '. If she refuses to pronounce the formula, she will suffer the penalty for adultery.

After sworn allegation, the man and woman are forbidden to each other forever, without divorce. If the husband denies the parentage of a child, the child is illegitimate. If the man should ever repent of his allegation, he must suffer the penalty for false accusation. In case a child is involved, its legitimacy will then be restored; according to the Sunnis, in such a case the father and the child inherit from each other, but according to the Shi'is, the father may not inherit from the child. [78] The woman continues to be forbidden to the man.

VIII. Inheritance *(Mirath)*

Husband and wife inherit from each other according to set rules. The only condition for inheritance is a valid marriage contract, not consummation of the marriage.

If the wife should die childless, the husband inherits one-half of her property; if she had a child or children, he inherits one-fourth. If the husband should die childless, the wife inherits one-fourth of her property; if he had children, she inherits one-eighth.

If the deceased wife should have no other relatives, all property goes to the husband. If the deceased husband should have no other relatives, the wife will inherit one-half the property and the rest will go to the *bayt al-mal* (the community treasury), except according to one of two Shi'i opinions, which holds that she inherits all the property. [79] If the deceased husband had more than one wife, the wife's share is divided among them equally.

The husband inherits from everything left by the wife. According to the Sunni schools, the wife also inherits from everything left by the husband; in general the Shi'is hold that if she does not have any children from the husband, she inherits from all property except land, though she does inherit from the value of property situated upon the land, such as buildings, trees, implements, etc. [80]

If a woman should be in a period of revocable divorce when she or her husband dies, her situation is the same as that of an ordinary wife. But when irrevocable divorce has taken place, there is no inheritance, with the exception of divorce during illness. If the husband should be ill and divorce his wife irrevocably, and if she should then die, he does not inherit from her; but if the husband should die as a result of the illness, the schools differ as to the situation. The Hanbalis hold that the wife inherits as long as she has not remarried. The Hanafis say that she inherits as long as she is still in her waiting period. The Malikis hold that she inherits in any case. The Shafi'is have two opinions, one that there is no inheritance, the other that the situation is as the Hanafis say. The Shi'is maintain that she may inherit within one year of the divorce provided she has not remarried. [81]

Footnotes:

[1]. 'Abd al-Rahman al-Jaziri, *al-Fiqh 'ala al-madhahib al-arba'a* (hereafter cited as *Fiqh), Cairo, 1969, IV, 24.*

[2]. Al-Shahid al Thani (Zayn al-Din Muhammad ibn 'Ali al-Jab'i al-'Amili [d. 965/1558]), *al-Rawdat al-bahiyya fi sharh al-lum'at al-Dimashqiyya* (hereafter cited as *Sharh al-luma), Beirut,* 1967, v, 108.

[3]. *Fiqh*, IV, 13.

[4]. Ibid., 18.

[5]. Ibid., 25.

[6]. *Sharh al-lum'a*. v. 234.

[7]. *Fiqh*, IV, 54-60.

[8]. *Sharh al-lum'a*, V, 181; Muhammad 'Ali al-Tabataba'i (d. 1231/1816), *Riyad al-masail* (also known as *al-Sharh al-Kabir)*, Tabriz, 1308/1890-9 1,II, 94.

[9]. *Fiqh*, IV, 63.

[10]. Ibid.,65.

[11]. Ibid.,66.

[12]. Ibid.,67-68.

[13]. *Sharh al-lum'a,* v, 176-82; *Riyad,* II,96-97.

[14]. *Fiqh*, IV, 268; *Riyad*, II, 86.

[15]. *Fiqh*, IV, 256.

[16]. Ibid.,253-55.

[17]. Ibid.,268-69.

[18]. *Riyad*, II, 86.

[19]. *Fiqh*, IV, 253.

[20]. *Riyad*, II, 86.

[21]. *Fiqh,lv,257*.

[22]. *Riyad*, II, 87.

[23]. *Fiqh,IV*, 257.

[24]. Ibid., 256; *Sharh al-lum'a,* II, 63.

[25]. *Fiqh*, IV, 254,255, and 261.

[26]. *Sharh al-lum'a*, v, 156; *Riyad,* II, 105-06.

[27]. *Fiqh*, IV, 77-84; *Riyad*, II, 181; *Sharh al-lum'a*, VI, 46.

[28]. *Fiqh,IV*, 27.

[29]. Ibid., 46--47.

[30]. The major sources for this ruling are two *hadith:* 'If any of your women marry without the permission ofher guardian, the marriage is invalid *(batil)'* (Abu Dawud, *Nikah* 19; al-Darimi, *Nikah* 11). 'A woman may not be given in marriage by a woman, nor may a woman give herself in marriage' (Ibn Maja, *Nikah* 15 Malik, *Nikah* 5).

[31]. *Fiqh*, IV, 46--47; *Sharh al-lum'a,* V, 112; Muhammad b. al-Hasan al-Hurr al-'Amili (d. 1104-1693), *Wasa'il al-shi'a,* Tehran, 1385/1965-66, XIV, 220-221, *hadith* 1-3.

[32]. *Fiqh*, IV, 46.

[33]. Ibid.,51-52.

[34]. Ibid., *Sharh al-lum'a,* v, 116.

[35]. *Fiqh*, IV, 51-52.

[36]. Ibid.,51.

[37]. Ibid.,25.

[38]. Ibid.

[39]. *Sharh al-lum'a*, V, 112; *Riyad*, II, 70.

[40]. *Fiqh*, IV, 108.

[41]. Ibid.,109.

[42]. Ibid., III.

[43]. Ibid.,115.

[44]. *Sharh al-lum'a,* II, 101; *Riyad,* II, 135.

[45]. *Fiqh*, IV, 120-21; *Sharh al-lum'a,* II,101; *Riyad,* II, 135.

[46]. *Fiqh,lv,118.*

[47]. Ibid.,116.

[48]. *Sharh al-lum'a, v,* 371-72; *Riyad*, II, 149

[49]. *Fiqh*, IV, 165.

[50]. Ibid., 163; *Riyad,* II, 109-10.

[51]. *Fiqh*, IV, 581; *Sharh al-lum'a,* v, 237-38; *Riyad*, II, 109-10.

[52]. *Fiqh*, IV, 189-92.

[53]. Ibid.,197.

[54]. Ibid.,181-98.

[55]. *Sharh al-lum'a,* v, 387; *Riyad,* II, 132-35.

[56]. *Fiqh,IV,* 280.

[57]. *Sharh al-lum'a,vi,* 11*; Riyad,II,* 168-75.

[58]. *Fiqh*, IV, 284.

[59]. *Sharh al-lum'a,* VI, 14-21; *Riyad*, II, 172.

[60]. *Riyad*, II,171.

[61]. *Fiqh,lv,297.*

[62]. Ibid.,310.

[63]. *Sharh al-lum'a,* VI, 31-32; *Riyad,* II, 176.

[64]. *Fiqh*, IV, 305, and 307.

[65]. Ibid., 302; *Sharh al-lum'a,* VI, 36-37; *Riyad,* II. 176.

[66]. The necessity for the *muhallil* is established by Qur'an 2:230. , And if he divorces her finally, she shall not be lawful to him after that, until she marries another husband. If he divorces her, then it is no fault in them to return to each other.'

[67]. *Fiqh*, IV, 435-41.

[68]. *Sharh al-lum'a,* VI, 104-07; *Riyad,* II, 196.

[69]. *Fiqh*, IV, 424.

[70]. *Sharh al-lum'a,* VI, 87-89, and 111-13; *Riyad,* II, 107.

[71]. *Sharh al-lum'a,* VI, 90-95.

[72]. Ibid., 62-63; *Riyad*, II, 187.

[73]. *Sharh al-lum'a,* VI, 65-66; *Riyad,* II, 188.

[74]. *Fiqh*, IV, 540-52; *Sharh al-lum'a,* VI, 57-65; *Riyad,* II,183-86.

[75]. *Sharh al-lum'a,* VI, 160; *Riyad,* II, 123.

[76]. *Fiqh*, IV, 485.

[77]. *Riyad,* II,122.

[78]. *Sharh al-lum'a,* VI, 210-12; *Riyad,* II, 217-18.

[79]. *Sharh al-lum'a,* VIII, 65-66; *Riyad,* II, 366.

[80]. *Sharh al-lum'a,* VIII, 172 74; *Riyad,* II, 367.

[81]. *Sharh al-lum'a,* VIII, 172; *Riyad,* II, 367, 369.

The Four Pillars Of Mut'a

The Arabic dictionaries define *mut'a* as 'enjoyment, pleasure, delight'. The root form, *m-t:* signifies, 'to carry away, to take away'. A 'marriage of *mut'a'* is a marriage which the contract stipulates will last for a fixed period of time. This 'marriage of *mut'a'* is referred to both in the *hadith* literature and, in much more detail, in the books on jurisprudence *(fiqh*). In the *hadith* and in other sayings related from early Muslims the word *'mut'a'* itself is usually employed. The Shi'is hold that this particular term is the preferred name for temporary marriage because the Qur'an itself refers to this kind of marriage employing a term derived from the same root. In the following verse, the word *istimta'*, the tenth verbal form of the root *m-t-'*, is translated as 'enjoy': 'So those of them [women] whom you enjoy, give to them their appointed wages' (4:24).

In general the word *mut'a* was more commonly used than other terms for temporary marriage both during the lifetime of the Prophet and afterwards during the time of the Shi'i Imams and other Muslim leaders. Both its proponents and opponents preferred this word and its derivatives. In *Wasa'il al-shi'a*, the comprehensive and definitive reference work for Shi'i *hadith* concerning all branches of jurisprudence, the word *mut'a* is employed in the headings of all sections on temporary marriage.

In books on jurisprudence the terms *mut'a*, *al-nikah al-munqati'* ('discontinued marriage'), and *al-nikah al-muwaqqat* ('temporary marriage') are all employed. Al-Muhaqqiq al-Hilli [1] still employs the term 'discontinued marriage' in his writings, [2] and hence his commentators use the same expression, although in sections of the statutes relating to this kind of marriage they also employ the terms *istimta'* and the related word *tamattu'*. Al-Shahid al Thani [3] employs the same term as al-Hilli [4] , but others, such as al-Shahid al-Awwal, [5] al-'Allama al-Hilli [6] and al-Shaykh al-Ansari [7] prefer the term *mut'a*. [8]

Among Sunni jurisprudents there is a discussion concerning whether or not the marriage of *mut'a* is the same as 'temporary marriage'. Most of them have agreed that they are synonymous. [9]

In some works a special term is applied to women who participate in *mut'a: musta'jara*, or 'rented woman'. *Mut'a* is considered a kind of 'rental' because in general a man's basic aim in this kind of marriage is the sexual enjoyment of a woman, and in return for his enjoyment the woman receives a certain amount of money or property. In defining 'rental' the jurisprudents

say: 'It is to gain possession of a benefit in exchange for a specified sum.' [10] This definition applies equally to temporary marriage. In this connection a number of *hadith* have been recorded in which the word *musta'jara* is employed. [11]

Shi'i jurisprudence discusses temporary marriage with all the care it bestows upon permanent marriage. Like permanent marriage, *mut'a* has 'pillars' and 'statutes'. To the two pillars of permanent marriage-the formula and the persons-are added the time period and the dower .

I. The Formula

Since it is a contract, *mut'a* requires a declaration and an acceptance. As in permanent marriage, the declaration is the prerequisite of the woman. It must consist of one of three Arabic formulas, the same three which are employed by the Shi'is in permanent marriage. Al-Sayyid al-Murtada [12] is said to have added that a slave girl may employ the formula 'I have allowed you' *(abahtu-ka)* or 'I have considered you lawful' *(hallaltu-ka),* [13] but his words have not been confirmed by others. Al-Shahid al Thani writes: 'To me it seems more correct to limit ourselves to the first three phrases.' [14] Apparently there is no disagreement on the point that the woman may not employ expressions like: 'I have given you possession', 'I have given to you as a gift', 'I have rented to you', 'I have lent to you', etc.

The 'acceptance' is made by the man after the woman has made her declaration. His words must demonstrate that he is satisfied with the declaration. For example, he may say: 'I will accept the marriage', or 'I accept the *mut'a.'* If he should say only: 'I accept' or 'I am satisfied', the contract is valid.

That the declaration should precede the acceptance is not a condition of the contract, since a contract consists of a declaration and an acceptance, in whatever order the two may occur. It is claimed that there is a consensus on this point. [15] Al-Muhaqqiq al-Hilli states explicitly that if the man says: 'I have married you', and then the woman says the same thing to him, the contract is sound. [16]

According to al-'Allama al-Hilli, the formula of the contract must be recited in the perfect tense. [17] But the majority of the *'ulama'* hold that it is permissible for it to be recited in the imperfect tense, as long as there is the intention of contracting the marriage. [18] Many *hadith* have been related showing that the imperfect tense is acceptable. For example, the Imam Ja'far al-Sadiq was once asked what formula should be recited when a *mut'a* is contracted. He replied: 'I marry thee in *mut'a* according to the Book of God and His prophet's *sunna* without inheritance from me to thee or vice versa, for so many days, for so many dirhams. .....' [19]

The legal discussions of contracts assert that the persons who make the declaration and acceptance must be 'worthy of the contract' *(ahl al 'aqd)*. In the question of *mut'a* this means that those who conclude the contract must be the man and woman themselves, or their representatives *(wakil)*, or their fathers. Hence, for example, it is permissible for the father to say: 'I give my daughter in *mut'a* with her agreement.' If anyone other than the above persons should conclude the contract, it is 'uncommissioned' *(fuduli)* and therefore invalid.

II. The Persons

A man can conclude a contract *of mut'a* only with a Muslim or one of the 'People of the Book'. It is not permissible to engage in temporary marriage with an unbeliever or an enemy of the Household of the Prophet *(ah! a!-hayt*, i.e., the Imams), such as a follower of the Khawarij. A Muslim woman cannot marry a non-Muslim.

If the man has a free, permanent wife, he cannot contract a *mut'a* with a slave without his wife's permission. Should he do so, the contract is invalid or in abeyance pending her permission. If the slave should belong to someone else, a *mut'a* cannot be contracted without her master's permission. Several *hadith* have been recorded on this point, For example, the Imam Ja'far says: 'There is nothing wrong with marrying a slave [temporarily] with the permission of her master.' [20]

A man is not permitted to marry the daughter of his sister-in-Iaw or brother-in-law without his wife's permission. Should a contract be concluded without her permission it is invalid or in abeyance until she gives her permission. [21] With these two exceptions, the relatives to whom marriage is not permitted are the same as in permanent marriage.

It is recommended that a Muslim man conclude a temporary marriage only with a chaste Muslim woman. Here by 'chaste' (*afifa)* the classical authors have in mind someone who has never committed fornication and who follows the *shari'a* in her activities. More specifically, the adjective denotes a woman who has observed the *shar'i laws* concerning marriage and in general is honest and upright. The two attributes 'Muslim' and 'chaste' are derived from sayings by two of the Imams: the Imam al-Rida was asked: 'Is it possible for a man to conclude a temporary marriage with a Jew or a Christian?' He answered: 'I would prefer that he engage in *mut'a* with a free Muslim woman.' [22] To a question about performing *mut'a*, the Imam Ja'far replied: 'It is permissible. So marry none but a chaste woman, for God says, " And those who guard their private parts" (23:5). Hence you should not put your private parts where you do not feel safe with your dirhams.' [23]

If someone makes an accusation against a woman, it is recommended that before concluding the contract of *mut'a* with her the man inquire from her about her situation, i.e., as to whether or not she has a husband and whether or not she is chaste. But asking is not a condition of the

contract. [24] According to the 'Principles of Jurisprudence', [25] the principle of 'correctness' as applied to the acts of a Muslim [26] demands that one consider the act of a woman who has declared herself ready to enter into *mut'a* as correct. According to this principle, whenever we are in doubt concerning the correctness of the act of a Muslim, we preserve the social and legal order by judging that his act was correct. For example, if we are in doubt concerning the legality of a couple's marriage, we judge that it was legal. Otherwise we would also have to doubt the legitimacy of their children, the application of the laws of inheritance, etc. In a different area of the law, the canonical prayer provides a good example: If, after finishing his prayer, a person doubts as to whether or not he said the correct number of cycles, he assumes the number was correct, Otherwise he would spend a good deal of his time repeating acts of worship he has already performed. The slightest doubt would be sufficient to cause him to repeat the same act.

On the basis of this principle, one must dismiss the possibility that a potential wife might be unchaste, so it is unnecessary to ask her. Several *hadith* are related which demonstrate the reprehensibility of asking about the woman's situation *after* the contract has been concluded. For example, a man once said to the Imam Ja'far: 'I married a woman temporarily, and then it came to my mind that she might already have a husband. I investigated the matter and found out that it was so.' The Imam said: 'And why did you investigate?' [27]

It is reprehensible for a man to conclude a marriage of *mut'a* with a fornicatress, by reason of the Qur'anic verse: 'The fornicator shall marry not but a fornicatress or an idolatress, and the fornicatress-none shall marry her but a fornicator or an idolator; that is forbidden to the believers' (24:3). If a man should contract a temporary marriage with a fornicatress, it is his duty to command her not to perform adultery. But this is not a necessary condition of the marriage, by reason of the 'principle of correctness' as applied to the Muslim's act. [28]

It is also reprehensible, without any exceptions, to contract a temporary marriage with a virgin, by reason of the words of the Imam Ja'far: 'It is reprehensible, because it is a stain upon her family.' [29] If a contract should nevertheless be concluded, it is not permissible for the man to consummate the marriage, unless the marriage took place with the permission of her father-a condition almost impossible to imagine in Muslim society. 'A virgin may not be married temporarily without her father's permission' (the Imam al-Rida). [30]

III. The Time Period *(Mudda)*

The time period of a temporary marriage must be delineated in a manner which allows no possibility of increase or decrease. According to the Imam al-Rida, '. ..*(mut'a* must) be a stipulated thing for a stipulated period.' [31] In addition, the Imam was once asked if it is possible to conclude a contact of *mut'a* for 'one or two hours'. He replied, 'No time limit is understood from "one or two" hours.' [32]

According to al-Shaykh al-Ansari, all of the *hadith* indicate that it is permissible for the agreed upon time period either to be joined to the moment of concluding the contract or to be postponed. [33] The situation here is the same as with a contract concluded for purposes of rental, since-as was pointed out above-the woman takes on certain legal characteristics of rented property.

In the case of a temporary marriage which begins after a period of postponement, there arises the question of whether or not the woman may marry a second man in the period between the conclusion of the contract and the beginning of the marriage period. Here there are two possibilities: that it is not permitted, because the woman already has a husband; or that it is permitted, because of the existence of all the 'requisites of a contract' and the absence of an impediment. Apparently the ruling here is that a second temporary marriage would be permissible provided that the woman has enough time before the beginning of the first marriage to conclude a second marriage and then to observe her waiting period.

As for the possibility of postponing the beginning of *mut'a*, this is conditional upon the stipulation of the day and the month in which it is to begin. For example, if the man should state that the contract will be for one month but fail to stipulate exactly when that month is to begin, the contract is invalid because the time is not stated. In contracts of rental, such instances are always invalid. [34] But if the contract should be nonconditional, without any mention of a postponement, then the marriage begins as soon as the contract is concluded, since, according to the accepted standard, when a contract has been concluded, the transaction has taken place. [35] The most authoritative view holds that if the stipulated period is not mentioned in the text of the contract, the marriage cannot take place and the contract is invalid. [36] The consensus of the community has established that one of the two pillars that differentiate *mut'a* from permanent marriage is mention of the time period; whenever this pillar is not present, everything that depends on it is invalidated. In addition, a contract follows the intentions of those who conclude it, Thus, if the time period is not mentioned, the marriage cannot be transformed into a permanent one, since that was not the intention. In this connection a *hadith* has been related from the Imam Ja'far: 'There will be no *mut'a* without two things: a stipulated period and a stated dowry.' [37]

In spite of this opinion, the majority of the *'ulama'* hold that if the time period is not mentioned, the contract is not invalidated; rather, the marriage becomes a permanent one. These scholars argue that a marriage contract is concluded either for temporary or permanent marriage. If a time period is mentioned, the contract is for *mut'a;* but if it is not mentioned, the contract is for permanent marriage. Hence, whenever the contract of *mut'a* is invalidated because the time period has not yet been stipulated, the contract will be one of permanent marriage. Here they cite the principle of 'correctness' in relation to the contract, In order to corroborate their argument, they mention a *hadith* of the Imam Ja'far: 'If a time period is stated, the marriage is *mut'a;* if it is not stated, it is permanent,' [38]

In opposition to those who hold that a temporary marriage is transformed into a permanent marriage if the time period is not mentioned, al-Shaykh al-Ansari writes that temporary marriage and permanent marriage are two different realities. Although the word 'marriage' is employed for both, this does not make them share in the same nature. The difference between the two does not lie in saying that one is an unconditional marriage and the other conditional. No, the relationship between them is like that between purchasing something and receiving a gift. In both cases, 'ownership' is the result. But the fact that purchasing an object and receiving a gift have a common measure does not mean that they have the same nature. We cannot say that the only difference between the two is that receiving a gift entails 'unconditional ownership' and purchasing entails 'ownership conditional on payment'. No one would ever claim that when someone says: 'I have transferred ownership' and forgets to mention a price, the purchase is immediately transformed into a gift. The relationship between temporary and permanent marriage is similar. [39]

In *Sharh al-Ium'a* al-Shahid al Thani adds that the *hadith* which is quoted from the Imam Ja'far in support of the position of the majority of the *'ulama' does* not state explicitly that the desire of the two parties to the contract is to conclude a marriage of *mut'a, but then they fail to mention the time period. On the contrary, the purport of the hadith* is *that marriage with a stated period* is *muta,* while marriage without a stated period is permanent marriage. [40]

There is no upper or lower limit to the duration of the time period. It makes no difference if the period is extremely long, so that one doubts whether the parties will survive its duration; or if it is extremely short, so that there is no possibility of consummation. In other words, any time period is permissible, so long as both sides are aware of the situation and are satisfied. [41]

Once the contract is concluded the wife receives the whole dowry, whether or not the husband consummates the marriage before the time period expires. The wife is entitled to the dowry as long as she places herself at her husband's disposal and does not present him with any obstacles to consummating the marriage. The situation is exactly the same as renting a house, but then choosing not to take up residence before the rental period has expired. When the time period is over, the wife is freed from the obligations of the contract. [42]

It is not permissible for the parties to stipulate in the contract 'one act of intercourse' or the like without mentioning a time period, since such an expression cannot take the place of a stipulated period of time. In the view of most of the *'u!ama'*, if such a contract were to be concluded, it would not be transformed into that of a permanent marriage, since the time period has been mentioned incorrectly. The fact that the contract has been concluded in an improper manner and is thus invalid as a contract carries more weight than the failure to mention the stipulated period.

However, if the time period is mentioned along with the condition that the marriage will

entail only a certain number of sexual acts, the contract is correct, Here the juridical principle that comes into play is enunciated in the Prophet's saying: 'The believers hold fast to their conditions [when they stipulate them in agreements]. ' [43] In such a situation, as soon as the man has performed the agreed number of sexual acts, further sexual intercourse with the woman is forbidden, even if the time period has not elapsed. There is no contradiction between the continuation of the marriage and the interdiction of sexual relations.

A complication would arise in the above situation if, after the woman has been forbidden to the man, she gives him permission to engage in further acts of sexual intercourse. Is the man allowed to have intercourse or not? Here there are two opinions. According to the first, there is a definite obstacle to sexual relations. For the contract does not allow any further sexual acts, so the permission of the woman is immaterial, since it is not sufficient to override the stipulations of the contract and legitimize relations. According to the second opinion, intercourse is permitted. Since in *mut'a-in* contrast to permanent marriage-a woman does not have the right to initiate a sexual act, the obstacle to sexual relations in the present situation is the woman's unwillingness to permit anything more than what was agreed upon in the contract, But the contract itself establishes the permissibility of intercourse. So if the obstacle is removed, the result will be that the contract as such will come into play. [44]

If the role of the time period is to contain a stipulated number of sexual acts, whenever the number is finished, the woman is free of any further obligation to the man. It goes without saying that if the stipulated number of sexual acts is not performed by the end of the time period, the marriage still comes to an end. [45]

IV. The Dower

The contract must mention a dower of known property, whether in cash or kind, whose amount is safe from increase or decrease. In order to gain knowledge of the property, it is sufficient for the woman to see it, but it is not necessary that it actually be weighed, measured, or counted-whatever the case may require. The contract of *mut'a* is not simply an exchange of goods, but a marriage. Even if it is defined as a 'rental', that also is different from an exchange. Hence it is sufficient that any possibility of misunderstanding which might arise from not seeing the dower be removed. As for goods which are not present, it is sufficient that the dower be described in such a manner that the woman's ignorance will be removed, i.e., that it be described exactly as it is. [46]

There is no condition or requirement concerning the amount of the dower except that the two sides come to an agreement over articles which may properly be exchanged, even if they are no more than a few grains of wheat. [47] On this point there are specified *hadith* as well as the *general hadith* which state that a woman who enters into *mut'a* is 'rented'. [48] If the dower is not mentioned, the contract is unanimously held to be invalid, On this point also there are a number of *hadith.* [49]

The woman may ask for the whole amount of the dower at the beginning of the marriage. In this case, the man may not take back any of the dower under any circumstances, unless for some reason the contract should have been invalid from the beginning (see below). Several *hadith* are recorded which establish this point without question. [50]

In a situation where a contract is concluded, but before the beginning of the time period the man decides not to go through with the marriage but to 'give back' to the woman the contracted time, she is entitled to one-half the dower. The situation is similar to divorce before consummation in permanent marriage. [51]

But if the man should give only part of the time period back to the woman before consummation, there is a difference of opinion as to the dower. According to al-Shaykh al-Ansari and al-Shahid al Thani, the situation cannot be the same as in the first case--where the whole time period was given back-since in this second case the essential point is that *mut'a* demands a full dower. [52]

The difference between the first and second cases is explained in more detail by al-Shahid al Thani. He poses the question: 'What is it that requires one-half of the dower to be held back from the woman? Is it two things together, i.e., not consummating the marriage and giving back the whole of the time period? Or does the problem revolve around whether or not the marriage was consummated?' He states that there are two possibilities: On the one hand, the *hadith* are explicit concerning the matter of consummation. The situation is exactly the same as in divorce after permanent marriage: one-half of the dower must be paid if the marriage has not been consummated, but the whole dower must be paid if it has been consummated. So in this respect, the reason that one-half the dower is held back is that the marriage was not consummated. On the other hand, there is the question of what exactly necessitates that the dower be paid. In permanent marriage the key element is consummation. But temporary marriage is different from permanent marriage because of the time period. Therefore the time period also must be taken into account. [53]

Al-Shahid al Thani remarks that the difference between these two possible interpretations becomes obvious in a situation where the husband should return more than one-half of the time period to the wife, not having consummated the marriage. According to the first interpretation, the wife must receive the whole dower; but according to the second, she is only entitled to one-half of it, He concludes that the second interpretation would seem to be the correct one, so long as we accept the authenticity of the *hadith* attributed to the Imam al-Hasan: When asked about a man who gave the remaining time period back to his temporary wife before the consummation of the marriage, he replied in a general sense, 'The woman must return one-half the dower to the man.' [54]

Al-Shaykh Muhammad al-Hasan holds that whether the full dower or only one-half is to be paid depends totally upon the question of consummation. 'Giving back the time period' is equivalent to using it up completely. In other words, when the man returns the remaining time period to the woman, he has already taken possession of conjugal rights with her for the elapsed time. But this does not require that the woman relinquish one-half of the dower. In this respect the situation resembles the woman's 'giving back the dower' in permanent marriage. If the woman thus relinquishes her claim to it, this does not mean that her husband is no longer her husband in the full sense. Therefore, giving back the time period has no relationship with the dower being reduced to one-half. The only question to consider is whether or not the marriage has been consummated. If it has been consummated and then the husband returns some or all of the remaining time, the wife is entitled to the whole dower, since without question the dower becomes necessary as soon as consummation takes place. [55]

Whether the time period is given back with or without consummation, the wife's consent is unnecessary, since giving back the period is equivalent to the erasing of a debt owed by the woman. [56]

If of her own free will a woman who has concluded a contract of *mut'a* should separate from her husband before the end of the time period, whether before or after consummation, the man reduces the dower in proportion to the amount of time by which the time period of the *mut'a* has been reduced-provided, that is, that he has not already paid her the full dower. [57] Thus, for example, if the woman's dower is 3000 rials and the time period 30 days; and if the woman should separate from her husband after 20 days, her husband would reduce the dower by one-third. Hence, if the woman should fail to fulfill any of the conditions of the marriage for the whole time period, she forfeits the whole dower. The reason she forfeits part or all of it is that first, the contract of *mut'a* by definition entails an exchange, such that the woman is in the position of a 'rented' object, Second, numerous *hadith* have been recorded concerning this particular point, For example, the Imam Ja'far was asked if it is permissible to hold back part of the dower if the woman fails to put herself at her husband's disposal. He replied: 'It is permissible for you to hold back what you can [i.e., what you have not already given her]. So if she goes back on her word, take from her [in proportion to] the amount she has broken the contract.' [58]

However, if the woman should fail to provide the man with conjugal rights because of an excuse sanctioned by the *sharia*, such as menstruation or 'fear of an oppressor', then the dower may not be reduced. A man came to the Imam Ja'far and said: [59] 'I concluded a contract of *mut'a* with a woman for one month for a given amount, But the woman only came to me for part of the month, and part she stayed away.' The Imam replied: 'An amount should be held back from her dower equivalent to the amount she stayed from you, except for the days of her menstruation, for those belong to her.'

If it should become apparent that the contract is invalid because the woman already has a husband, or because she should be maintaining a waiting period as the result of a previous marriage, or because she is forbidden to the man by family relationship, or because of some other reason, then one of the following courses of action should be taken:

If the marriage has already been consummated and if the woman was ignorant of the fact that the contract was invalid at the time of sexual intercourse, then she should be given the 'normal dower'. Here the reasoning is that the fact of intercourse has to be honored and compensation given. Since the contract is invalid, the 'specified dower' is nullified; hence the normal dower must be paid. [60]

As for whether the normal dower is the same as that for permanent marriage or is to be adjusted according to the time period of the *mut'a*, the most authoritative opinion is voiced by al-Shaykh al-Ansari and al-Shaykh Muhammad al-Hasan. They hold that the normal dower is the same as for permanent marriage. AI Tabataba'i argues that here the normal dower is compensation for 'mistaken intercourse'. Since the contract was invalid without the knowledge of the husband and wife, their intercourse is 'mistaken'. Therefore the man must pay the normal dowry of permanent marriage, which is demanded in any instance of 'mistaken intercourse'. [61] The time period for which the woman was at the man's disposal is irrelevant, just as there is no difference between one act of sexual intercourse and several acts as long as the mistake remains in force. [62]

If it should become apparent that the contract is invalid before the marriage is consummated, the woman receives no dower. Only a valid contract or the fact of intercourse warrants the dower's payment. Al-Shahid al Thani claims that on this point there is consensus among the *ulama*. [63]

If the marriage has been consummated and the woman was aware of the contract's invalidity, she can have no claim to a dower, since she is a fornicatress, and there is no dower for fornication.

In all three of the above cases, if the man has already given the woman the whole dower, she must return part or all of it as soon as the invalidity of the contract becomes apparent. If she no longer possesses the amount which must be returned, she is liable for it, no matter how it may have left her hands-whether, for example, she has spent it or it was stolen. [64]

If the woman should die during the period of the *mut'a*, even if it be before consummation, her dower may in no way be lessened, exactly as in permanent marriage. [65]

Footnotes:

[1]. Ja'far ibn Muhammad ibn Sa'id (602-76/1205-77), author of *Shara'i' al-islam,* a standard textbook of Shi'i fiqh and the subject of many commentaries.

[2]. *Shara'i',* Beirut, 1930,II,23.

[3]. Zayn al-Din Muhammad ibn 'Ali al-'A.mili (911-65/1505-58), author of *Sharh al-lum'a* (*al-Rawdat al-bahiyya fi sharh al-lum'a al-dimashqiyya*), a commentary on *al-Iuma al-dimashqiyya* by al-Shahid al-Awwal.

[4]. *Sharh al-lum'a,* v, 245.

[5]. Abu 'Abdullah Muhammad ibn Makki al-'Amili (d. 782/1380).

[6]. Jamal al-Din Hasan ibn Yusuf ibn Zayn al-Din 'Ali ibn al-Mutahhar (648-726/1250-1326), author of *Irshad al-adhhan ila ahkam al-iman.*

[7]. Murtada b. Muhammad Amin al-Dizfuli (1214-81/1800-64). His works *al-Matajir* on *fiqh* and *al-Rasa'il* on *us'ul al-fiqh* are considered the most complete textbooks on these sciences.

[8]. *Sharh al-lum'a,* v, 245; *al-Matajir,* Tehran 1352/1973, the book on *muta* (which is a commentary on al-'Allama's *Irshad).*

[9]. *Fiqh,IV,* 90.

[10]. *Shara'i,* I,233.

[11]. Muhammad ibn al-Hasan al-Hurr al-'Amili (1033-1104/1624-93), *Wasa'il al-shia,* Tehran, 1385/1965-66, XIV, 446.

[12]. 'Ali ibn al-Husayn al-Musawi (355-436/965-1044), leading Shi'i scholar and author of many works. His brother, al-Sharif al-Radi (d. 406/1015), was also a famous scholar and compiled 'Ali's *Nahj al-balagha.*

[13]. *Riyad,* II, 113; *Mukhtasar-i nafi'* (an 18th/14th century Persian summary of al-Muhaqqiq al-Hilli's *Shara'i'* by an unknown author), ed. M.T. Daneshpazhuh, Tehran, 1343/1964,231.

[14]. Al-Shahid al Thani, *Masalik al-ajham* (a commentary on *Shara'i'),* Tehran, 1273/1856-57, I,536.

[15]. *Sharh al-lum'a,* v, 110.

[16]. *Shara'i',*II, 24.

[17]. *al-Matajir*,II,298.

[18]. *Riyad,* II,113.

[19]. *Wasa'il,* XIV, 466.

[20]. Ibid.,463.

[21]. Shaykh Muhammad Hasan (d. 1266/1850), *Jawahir al-kalam* (a commentary

on *Shara'i'),* Tehran, 1325/1907, V, 165.

[22]. *Wasa'il,* XIV, 452.

[23]. Ibid.

[24]. *Jawahir,* v, 165.

[25]. *Usul al-fiqh,* the science that discusses the arts and techniques for making juridical judgments.

[26]. *Asl al-sihha.*

[27]. *Wasail,* XIV, 458, *hadith* 3.

[28]. *Jawahir,* V, 166,

[29].*Wasail,* XIV, 459, *hadith* 10.

[30]. Ibid., 458, *hadith* 5.

[31]. Ibid., 479, *hadith* I.

[32]. Ibid., *hadith* 2.

[33]. Ibid., 446, *hadith* 2 and 4.

[34]. *Matajir,* II, 300.

[35]. *Ibid.,Jawahir*,v,171.

[36]. *Matajir,* II, 299; *Sharh al-lum'a,* V, 287; *Jawahir,* V, 169.

[37]. *Wasa'ill,* XIV, *hadith* 1.

[38]. Ibid., 469, *hadith* 1.

[39]. *Matajir,* II, 299.

[40]. *Sharh al-lum'a,* V, 287.

[41]. Ibid.,285.

[42]. *Matajir,* II, 300; *Jawahir,* V, 170.

[43]. Sahih al-Bukhari, n.p., 1378/1958, III, 120.

[44]. *Matajir,* II, 300.

[45]. Ibid.

[46]. *Matajir,* II, 300; *Sharh al-lum'a,* V, 284.

[47]. *Wasa'il,* XIV, 467, *hadith* 5.

[48]. *Matajir,* II. 300; *Masalik,* I, 538.

[49]. *Wasa'il,* XIV, 465-66, *hadith* 1-3.

[50]. Ibid., 482, *hadith* 1-2; 483, *hadith* I.

[51]. *Sharh al-lum'a,* v, 285; *Shara'i,* II, 24; *Matajir,* II, 300; *Masalik,* 1,538.

[52]. *Matajir,* II, 301; *Sharh al-lum'a,* V, 285; *Masalik,* 1,538.

[53]. *Masalik,* I, 538.

[54]. *Wasa'il,* XIV, 483, *hadith* I.

[55]. *Jawahir,* V, 168.

[56]. *Sharh al-lum'a,* v, 285; *Masalik,* I,538.

[57]. *Sharh al-lum'a,*v,285.

[58]. *Wasail,* XIV, 481, *hadith* I.

[59]. Ibid., *hadith* 4.

[60]. *Masalik,* I,539*; Matajir,* II,301*; Riyad*,II,114.

[61]. *Riyad,* II ,115.

[62]. *Matajir,* II, 301.

[63]. *Masalik,* I, 538.

[64]. *Matajir,* II, 301; *Sharh al-lum'a,* v, 287-88.

[65]. *Sharh al-lum'a,* v, 286.

The Statutes Of Mut'a

Conditions In The Contract

IT IS permissible for one or more conditions to be mentioned in the contract of *mut'a*, so long as they are legitimate. A condition must be accompanied by a declaration and an acceptance. Fulfilling the condition then becomes necessary, since it is part of the contract,

As for conditions not mentioned in the text of the contract itself, but stated before or after the contract, their fulfillment is not obligatory. Concerning this point both al-Shaykh al-Ansari and al Tabataba'i claim a consensus of the *ulama*. [1] A number of *hadith* are mentioned in this connection, among them these words of the Imam Ja'far: ' Any condition before the marriage is destroyed by the marriage, but what is after the marriage is permissible.' [2] Here by 'after the marriage' is meant immediately after the words of the woman: 'I have married myself to thee.' Hence, the condition enters into the declaration and becomes a necessary condition of the marriage. ' After the marriage' does not signify after the acceptance by the man. The Imam's words 'permissible' here are usually interpreted to mean 'incumbent'. [3]

It is permissible for the contract to stipulate as a condition a particular time for meetings between the husband and wife, such as daytime or night-time. As already mentioned, it is also permissible for a given number of sexual acts for a given period to be stipulated, as for example, during one day or over the whole period of the marriage. These are legitimate conditions and in no way contradict the requirements of the contract. As the Prophet said: 'The believers hold fast to their conditions [which they stipulate].' However, if only a given number of sexual acts is stipulated without mention of a time period, the contract is invalid, since the time period must be stated. [4]

It is permissible for a condition to be stipulated that the marriage not be consummated, since again the condition is legitimate and does not contradict the requirements of the contract. [5] In addition, the Imam Ja'far was asked explicitly if such a condition was permissible. He replied: 'The man has to fulfill the stated conditions.' [6] However, according to the most widely held opinion, in such a case if the woman should give permission for intercourse during the time period, intercourse is then permissible. For the contract warrants intercourse, but if the condition of non-intercourse is laid down, that is the woman's right over the man. In other words, she has been 'rented' for the purpose of sexual intercourse, and the condition has become the barrier to this end. So if she chooses to waive the condition, she is then at the man's disposal. [7]

Coitus Interruptus

It is permissible to perform coitus interruptus, even if it is not mentioned as a condition in the contract. Al-Shahid al-Awwal and al Tabataba'i claim a consensus of the *ulama'* on this point. [8] They say the consensus derives from a *hadith* reported from the Imam Ja'far: 'That [semen] belongs to the man: he may expend it as he wishes.' [9] In addition, in contrast to permanent marriage, the basic aim of *mut'a* is enjoyment, not the production of offspring. [10]

If the woman becomes pregnant such that the pregnancy derives from the period of *mut'a*, the child belongs to the husband, even if he performed coitus interruptus. This statute applies to every legitimate act of sexual intercourse, not specifically to *mut'a*, since the principle enunciated in the saying: 'The child belongs to the bed' is of general application. [11] Al-Shaykh Muhammad al-Hasan claims consensus on this point. [12]

However, if the man should deny the child, then it does not belong to him; the 'sworn allegation' required in permanent marriage is not necessary. Al-Shahid al Thani, al-Shaykh al-Ansari and al-Shaykh Muhammad al-Hasan claim consensus on this question. They point out that the 'bed of *mut'a'*, like the 'bed of a slave-girl', does not hold the same high position as the bed of a permanent wife, since a wife by *mut'a* is a 'rented woman'. [13] On this point two *hadith* have been recorded. [14]

Al-Shahid al Thani adds that although sworn allegation is unnecessary in *mut'a,* this is the outward and exoteric statute, and there is another 'statute' established between man and God. In this second respect it is not permissible for the man to deny the child just because he performed coitus interruptus or suspects his wife of adultery. He must have definite knowledge that the child does not belong to him. Hence it is encumbent upon him to observe what exists between him and God, even though his word alone will be accepted and there is no need for him to make a sworn allegation. [15]

Divorce

By a consensus of the ulama there is no divorce in *mut'a.* [16] The man and woman become separated from each other through the expiration of the time period, or else by the man's 'returning' the remaining time to the woman. In this connection a saying of the Imam Ja'far is as explicit as possible. He was asked if the husband and wife married by *mut'a* become separated without divorce. He replied: 'Yes. ' [17]

Forswearing

In *mut'a* there is no forswearing, since forswearing's very definition has to do with divorce,

which does not exist in *mut'a*. Moreover, the woman cannot demand a right to sexual intercourse in temporary marriage, a demand which is essential in the establishment of forswearing in permanent marriage. The only thing the woman may demand is the dower, to which she is entitled as a 'rented' woman. [18]

Sworn Allegation

Sworn allegation does not take place in *muta*. According to the Imam Ja'far: 'A free man does not make a sworn allegation against a slave girl, a non-Muslim *(dhimmi)*, or a wife by *mut'a.'* [19] Moreover, in the case of denying parentage, by a consensus of the *ulama'* it is unnecessary for the man to make the sworn allegation, as we have already seen.

Zihar

There is a difference of opinion as to whether or not *zihar* may take place in temporary marriage. The majority of the *ulama'* hold that it can take place, since the Qur'anic pronouncements concerning it are general and not delimited. For example, the verse: 'Those of you who say, regarding their women: 'Be as my mother's back', they are not truly their mothers' (58:2) indicates that *zihar* pertains to any woman with whom intercourse may legitimately take place, a category within which a wife by *muta* is included. Al-Shahid al Thani, al Tabataba'i, and al-Muhaqqiq al-HiIIi all hold this opinion. [20]

But al-Shaykh al-Ansari and al-Shaykh Muhammad al-Hasan seem to prefer the opposite opinion, that *zihar* does not take place in *muta*. For the result of *zihar* is either returning to the wife, or finally divorcing her. As for the second possibility, there is no divorce in *mut'a.* And 'returning to the wife' is unnecessary in *mut'a*, whereas it *is* necessary in permanent marriage. When a man pronounces the formula of *zihar* in permanent marriage, the woman remains his wife. According to permanent marriage's statutes, she has a right to sexual intercourse. Once the man pronounces the formula of *zihar,* she may demand her right at any time. At that time the man must either pay the expiation or divorce her. But since the woman has no right to sexual intercourse in *mut'a,* the problem of 'return' to her does not present itself. At any rate, when the time period expires, separation takes place. Thus if *zihar* exists in *mut'a* it comes down to this: the man returns the remainder of the time period to the woman. There is no reason to claim that this returning is equivalent to divorce. [21]

Inheritance

According to the most widely held view, there is no inheritance between husband and wife in *mut'a* unless it should be specifically mentioned as a condition of the contract. One of the spouses may be named heir to the other, in which case the inheritance is one-sided; or it may be stipulated that if either spouse should die, the other will inherit.

If no such conditions are mentioned, there is no inheritance. According to the Imam Ja'far: ' Among *mut'a's* statutes is that you do not inherit from the woman, nor does she inherit from you. [22]

The reason that inheritance is permissible provided that the condition is entered into the contract is first the universal applicability of the prophetic *hadith:* 'The believers hold fast to their conditions.' Second, according to the Imam Ja'far: 'If they should stipulate the condition of inheritance [in the contract of *mut'a],* they must hold fast to this condition.' [23] Third, the Imam al-Rida has a similar saying: 'If they should stipulate the condition [of inheritance], it takes place; and if they should not, it does not take place.' [24] This position concerning inheritance is that held by such authorities as al-Shahid al-Awwal, al-Shahid al Thani, al-Shaykh al-Ansari, al-Muhaqqiq al-HiIIi, al-Shaykh Muhammad al-Hasan, and al Tabataba'i. [25]

Two other positions are worth quoting on this question, each of which finds its basis in the *hadith.*

Certain *ulama'* hold that inheritance cannot take place as a result of *mut'a*, whether or not it is mentioned in the contract. They base this opinion on the first *hadith* related from the Imam Ja'far above on the question of inheritance, a *hadith* which they interpret to apply to every case without exception.

Certain *ulama'* hold that inheritance takes place as long as there is no condition negating it in the contract. They base this opinion on the words of the Imam al-Baqir: 'The two of them inherit from each other (as a result of *mut'a)* as long as they do not mention a condition to the contrary.' [26]

There is also the question of inheritance by a child born as the result of a temporary marriage: its inheritance from its father is one-half of that of a child by permanent marriage, while its inheritance from its mother is the same as it would be in permanent marriage.

The Waiting Period

As in permanent marriage, so in *muta* there is a waiting period which must be observed after the time period of the marriage has expired or the man has returned the remainder of the period to the woman. It consists of two menstrual periods, provided she menstruates. This statute is based upon the following two *hadith:* 'To divorce a slave, one must pronounce the formula of divorce twice; her waiting period is two menstrual periods' (the Imam Musa), [27] The Imam al-Baqir was asked about the waiting period of a wife by *mut'a* if her husband should die. He answered: 'For every marriage, if the husband should die, the wife must observe a waiting period of four months and ten days, It makes no difference whether she is

free or a slave, and whether the marriage was permanent or temporary. The waiting period of a divorced [free] woman is three months, and that of a divorced slave one-half of what is required of a free woman. What is required of a wife by *mut'a* is the same as what is required of a slave.' [28]

It has been related that al-Shaykh al-Mufid, [29] al-'Allama al-Hilli, Ibn Idris, [30] and a number of the other *ulama'* hold that the waiting period of a wife by *mut'a* is two *fuhrs* i.e., two major ablutions following menstrual periods. They base this opinion on the *hadith* related from the Imam al-Baqir: '. ..If he is a free man married to a slave girl, he divorces her by pronouncing the formula of divorce twice; her waiting period is two *fuhrs.'* [31] And in the *hadith* quoted above, it is seen that the waiting period of a wife by *mut'a* is the same as that of a slave girl.

Al-Shahid al Thani, al-Shaykh al-Ansari, al Tabataba'i, and al-Shaykh Muhammad al-Hasan all state that caution demands that we prefer the first of these opinions-that the waiting period of a wife by *mut'a* is two menstrual periods, since the time period is longer. Besides the fact that a number of *hadith* indicate that the first opinion is stronger, the principle of jurisprudence which must be observed here is that of 'continuing prohibition': if something was definitely forbidden, but we now doubt as to whether or not it is still forbidden, we must assume that it continues to be forbidden until we have indisputable proof to the contrary . [32]

If the woman is of menstruating age but for some reason does not menstruate, her waiting period is 45 days, whether she is free or a slave. AI Tabataba'i claims a consensus of the *ulama'* on this point. [33]

If the husband by *mut'a* of a free woman should die, her waiting period is four months and ten days, so long as she is not pregnant and whether or not the marriage was consummated. [34] According to the Qur'an: 'Those of you who die, leaving wives, they shall wait by themselves for four months and ten days' (2:234). If the wife should be a slave, her waiting period is two months and five days, a point established by a large number of *hadith.*

It has been related that al-Shaykh al-Mufid, al-Sayyid al-Murtada, and certain other authorities held the opinion that the waiting period of a temporary wife whose husband dies is two months and five days, [35] for two reasons: first, two months and five days is the waiting period of a slave and-as has already been shown-when the time period of *mut'a* expires or the remaining time is returned to the wife, the wife's waiting period is the same as that of a slave. Here also her waiting period must be the same as that of a slave. Second, the Imam Ja'far was asked about the waiting period of a temporary wife whose husband dies. He answered: 'Sixty-five days.' [36]

Al-Shaykh Muhammad al-Hasan rejects this opinion as follows: the first reason is based on analogy *(qiyas),*[37] which cannot be a valid basis for a juridical opinion in Shi'ism. The

second reason is based upon a *hadith* of the *mursal* type, i.e., its chain of transmission is incomplete. Such a *hadith* can only be authoritative if it is strengthened by some other factor (such as *'shuhra':* being accepted by most of the *ulama).* Hence, in face of the stronger *hadith* which exist on the matter, one must reject this particular *hadith* and say that the waiting period of a temporary wife whose husband dies, whether she is free or a slave, is four months and ten days. [38] The reason given for this is the *hadith* of the Imam al-Baqir quoted above: 'For every marriage, if the husband should die, the wife must observe a waiting period of four months and ten days. ..' A *hadith* is also related from the Imam Ja'far to this effect. But al-Shahid al Thani rejects this opinion on the following grounds: To conclude from these two *hadith* that the waiting period of a temporary wife is definitely four months and ten days is problematic. In fact, one has no choice but to take these *hadith* as referring only to free women, so that they will be in accord with a number of other *hadith* which state that the waiting period of a slave woman whose husband has died is two months and five days.

Moreover, no reputable jurisprudent has held that the waiting period of a slave is four months and ten days. Finally, since in permanent marriage there is no question but that the waiting period of a slave is two months and five days, with greater reason the waiting period must be the same in *mut'a*. For the waiting period of *mut'a* is 'weaker' than other waiting periods, just as a marriage of *mut'a* is 'weaker' than permanent marriage. It is unreasonable to suppose that the waiting period of *mut'a* be 'stronger' and more stringent than the waiting period of permanent marriage. Nevertheless, because of the authority of the above *hadith*, caution may dictate that the longer waiting period be observed. [39]

If the wife should be pregnant, her waiting period will be either the usual one of four months and ten days (two months and five days for a slave) or the time it takes to give birth-whichever of the two is longer. AI Tabataba'i claims consensus on this point. [40]

Renewing The Contract

A contract of *mut'a* cannot be renewed before the time period expires. Hence, if the parties wish to renew the contract, it is only necessary for the man to return the remainder of the time period to the woman, thus in effect ending the marriage. Then they may conclude a new contract. When she remarries the same man, she has no waiting period. [41]

This method of renewing the contract is established by a *hadith* related from the Imam Ja'far. He was asked about a man who married a woman for a period of one month, but then found that a love for her was developing in his heart. Before the period expires, could he renew the contract and increase the time period and dowry? The Imam answered that such a course of action was not permissible so long as the first contract remained in effect. Therefore: 'He must return to her the remainder of the days [of the contract] and then conclude a new contract.' [42]

Footnotes:

[1]. *Riyad,II,116;Matajir*,II,301.

[2]. *Wasa'ill,* XIV, 468-69, *hadith,* 2.

[3]. Ibid.,468.

[4]. *Sharh al-lum'a,* v, 288; *Matajir,* II, 301.

[5]. *Matajir* ,II,301*;Jawahir,v, 173;Riyad*,II, 116.

[6]. *Wasa'il,* XIV, 491, *hadith* I.

[7]. *Riyad,* II,116.

[8]. *Sahrh al-lum'a,* V, 288; *Riyad,* II, 116.

[9]. *Wasa'il,* XIV, 489-90, *hadith* I.

[10]. *Sharh al-lum'a,* v, 288; *Riyad,* II, I 16.

[11]. *Sharh al-lum'a,* v, 288; *Matajir,* II, 300.

[12]. *Jawahir,v,173.*

[13]. Ibid., 173; *Masalik,* 1,542; *Matajir,* II,301.

[14]. *Wasa'il,* XIV, 488-89, *hadith* 4 and 5.

[15]. *Masalik,* 1,542.

[16]. *Matajir.* II. 301; *Masalik,* I, 542; *Jawahir,* v, 173; *Riyad.* II. 117; *Shara'i,* II, 125

[17]. *Wasa'il,* XIV, 478-79, *hadith* 1.

[18]. *Sharh al-lum'a, v,* 289; *Jawahir,v,* 173.

[19]. *Wasa'il,* xv, 596, *hadith* 5.

[20]. *Masalik,* I, 542; *Sharh al-lum'a,* v, 300; *Riyad,* II, I 17; *Shara'i',* II, 25; *Mukhtasar-i nafi',* 232.

[21]. *Matajir,* II, 301; *Jawahir,* v, 173-74.

[22]. *Wasa'il,* XIV, 486, *hadith* 8.

[23]. Ibid., *hadith* 5.

[24]. Ibid., 485, *hadith* 1.

[25]. *Luma,* text, and *Sharh al-lum'a,* v, 297-98; *Masalik,* I, 543; *Matajir,* II, 301; *Shara'i',* II, 25; *Mukhtasar-i nafi',* 232; *Jawahir,* v, 274; *Riyad,* II, 117.

[26]. *Wasa'il,* XIV, 486, *hadith* 2.

[27]. Ibid., XV, 470, *hadith* 5.

[28]. Ibid., 484, *hadith* 2.

[29]. Muhammad b. Muhammad b. al-Nu'man al-'Ukbari al-Baghdadi (d. 413/1022), author of numerous works on theology and jurisprudence.

[30]. Muhammad b. Idris al-Hilli (d. 598/1202).

[31]. *Wasa'il,* xv, 469, *hadith* 1.

[32]. *Sharh al-lum'a,* v, 301-2; *Masalik,* I, 544; *Matajir,* II, 301; *Riyad,* II, 118;

Jawahir, v, 176.

[33]. *Riyad,* II,118.

[34]. *Sharh al-lum'a,* v, 302; *Masalik,* I, 544; *Matajir,* II, 301; *Jawahir,* v, 176; *Riyad,* II, 118.

[35]. *Riyad,* II, 118; *Jawahir,v,* 176.

[36]. *Wasa'il,* XV, 485, *hadith* 4.

[37]. *Qiyas* is the fourth source of *fiqh* in Sunnism but not accepted by the Shi'is; instead the

latter employ *'aql'* or 'reason'. This is one of the main differences in *usul al-fiqh* between Sunnis and Shi'is.

[38]. *Jawahir,* V, 176.

[39]. *Sharh al-lum'a,* V, 304-7.

[40]. *Riyad,* II, 119.

[41]. *Mukhtasar-i nafi',* p.232; *Riyad,* 11, 119.

[42]. *Wasa'il,* XIV, 478, *hadith* I.

The Legitimacy Of Mut'a

The *ulama'*, both Sunni and Shi'i, agree that *mut'a* was permitted at the beginning of Islam. However, they disagree as to the reasons it was permitted.

The Shi'i View

In the sura entitled 'Women', after listing those women to whom marriage is forbidden, the Qur'an states as follows: 'Lawful for you is what is beyond all that, that you may seek, using your wealth, in wedlock and not in licence. So those of them whom you enjoy, give them their appointed wages; it is no fault in you in agreeing together, after the due apportionate. God is All-Knowing, All-Wise' (4:24). All Shi'i *ulama'* and some Sunni *ulama'* hold that this verse-especially the words: 'Such wives as you enjoy *(istamta'tum)'-refers* to the permissibility of *mut'a*. The Shi'is present several arguments to prove this point. [1]

This verse was revealed towards the beginning of the Prophet's stay in Medina, which lasted from AH 1/CE 622 to 10/632. At that time the men of Medina used to 'seek enjoyment' from women for a limited period of time in exchange for a specified sum of money. By its revelation this verse in effect confirmed an existing situation; and it emphasized that men must fulfill their promises concerning the agreed upon sum. In Medina this custom was looked upon as one kind of temporary marriage and was referred to by the term *istimta'*, the same word employed in the Qur'anic verse-even though the literal meaning of the word is 'to seek benefit' or 'to take enjoyment'. Hence the meaning of the Qur'anic verse must be understood in terms of the conventional usage of the time, for as is well known in the science of Qur'anic commentary and Islamic jurisprudence, the Qur'an follows the conventional usage of the people in all statutes and legal prescriptions. If someone wants to understand a word in the Qur'an in other than the conventional meaning of the time, he must supply a strong reason for doing so.

The context of the verse also indicates that it is referring to temporary marriage. In the preceding verses the Qur'an forbids acts of injustice toward women. 'Oh believers, it is not lawful for you to inherit from women against their will; neither debar them, that you may go off with part of what you have given them' (4:19). The most commonly accepted interpretation of this verse is that it forbids the pre-Islamic Arab custom of inheriting stepmothers. When a man died, one of his sons would inherit his wife, as long as she was not his own mother. The stepson would place a cloth upon his dead father's wife and thereby become her owner. If he wished he could then marry her without paying her a dower. Or he could keep her a virtual prisoner. He could also marry her to someone else and take her dower

for himself, or forbid her to marry anyone as long as he was alive. If the woman possessed property, he was entitled to take possession of it for himself. [2]

The next verse reads in part as follows: ' And if you desire to exchange a wife in place of another, and you have given to one a hundred-weight, take of it nothing' (4:20). In other words, if a man divorces a wife to marry a different wife, he must not take back any of the dower that he has given the first, even if the dower is a very large one and he desires only a small part of it.

The next subject referred to in this passage is the marriage of one's father's wife: ' And do not marry women that your fathers married. ..' (4:22). Both this verse and verse 19 were revealed after Abu Qays b. al-Aslat died and his wife was inherited and married by his son Muhsin. The son refused to pay the daily expenses of his stepmother and wife, nor would he give her, her share of the inheritance or allow her to visit her relatives. She came to the Prophet and explained what had happened. He told her to return to her husband and wait, that perhaps God would send down a statute that would clarify her situation. Then these verses were revealed. [3]

In the following verse (4:23) the Qur'an enumerates the women who are forbidden to men. These are divided into seven kinds stemming from blood relationship and seven more stemming from other causes: 'Forbidden to you are your mothers and daughters. ..'. The next verse adds a fifteenth category of women forbidden to men: ' And wedded women, save what your right hands own.' It continues with the words quoted above: 'Lawful for you is what is beyond all that.' In other words, any woman not belonging to one of the fifteen categories is permitted, whether by marriage or ownership.

Next the verse states: 'that you may seek, using your wealth, in wedlock and not in license.' Grammatically, this clause is in apposition to 'what is beyond all that.' It explains the legitimate mode of seeking sexual relationships with women, whether as the result of marriage or the purchase of slaves.

The next part of this same verse states as follows: 'So those of them whom you enjoy, give them their appointed wages.' The word 'so' *(fa)* shows that this part of the verse is the conclusion reached by the previous words. This section is either part of the previous subject matter, or an example of it; in other words, its relation to the previous section is either that of the part which is completing the whole, or the particular example to the universal principle. And since the previous section deals with the different kinds of legitimate sexual relationships, either by marriage or the purchase of slaves, we can conclude that this section of the verse is the exposition of a further kind of marriage, not mentioned previously; a kind which requires that the man pay the wages of his wife.

The next verse states that if a man is too poor to marry a free Muslim woman, he should

marry a Muslim slave girl; and the following verse concerns certain statutes related to such marriages.

Finally this section of the chapter concludes with these words: 'God desires to make clear to you, and to guide you to the customs of those who went before you, and to turn towards you; God is All-knowing, All-wise' (4:26).

Many sayings have been related from the Companions of the Prophet and those who followed them *(al-taibi'un)* confirming the Shi'i view that verse 24 of this chapter concerns *mut 'a*. Several of the companions, including Ibn 'Abbas, the ancestor of the 'Abbasid caliphs, Ibn Mas'ud, one of the first to accept Islam, and Ubayy b. Ka'b, one of the scribes of the revelation, hold that three words have been dropped form this passage in the Qur'an and that the original version read: 'So those of them whom you enjoy *to a specified term (ila ajal musamma).'* This clearly indicates that the verse refers to *mut'a*. For example, it has been related that Ibn 'Abbas was asked about *mut'a*. He answered: 'Have you not read the sura "Women" (4).' His questioner replied: 'Of course I have.' He said: 'Did you not read: "So those of them whom you enjoy to a specified term. .." , He answered: 'I did not read the verse like that.' Ibn 'Abbas then said: 'I swear by God, this is how God revealed it', and he repeated this statement twice. [4]

In *Majma' al-bayan*, al Tabarsi, the famous Shi'i commentator of the Qur'an summarizes the Shi'i arguments: the word 'enjoy' in this verse refers to the marriage of *mut'a*, i.e., a marriage for a specified dower and a determined time period. This opinion has been related from Ibn 'Abbas and many of the 'followers' of the Companions such as Isma'il b. 'Abd al-Rahman al-Suddi (d. 127/744-45) and Sa'id b. Jubayr al-Asadi (95/713-14). In fact, this clearly must be the case, for although the words *istimta'* and *mut'a* have the literal meaning of 'enjoyment', in the language of the *shari'a* they refer to the contract of temporary marriage, especially when they are followed by the word 'women'. Hence the meaning of the verse is: 'Whenever you draw up a contract of *mut'a* with a woman, you must pay her, her wages.' [5]

The Sunni View

As was indicated above, the Sunnis agree that at the beginning of Islam *mut'a* was permitted. For example, Fakhr al-Din al-Razi (d. 606/1209), the famous Sunni theologian, writes in his *Great Commentary* on the Qur'an that *mut'a* was at first permitted. The Prophet made a 'lesser pilgrimage' *('umra)* to Mecca, and the women of Mecca made themselves up especially for the occasion. Some of the Companions complained about their long separation from their wives, and the Prophet replied: 'Then go and enjoy *(istimta')* these women.' [6]

Those Sunnis who hold that the Qur'anic verse mentioned above (4:23) does indeed refer to the permissibility of *mut'a* also maintain that the verse was subsequently abrogated *(naskh)* by other Qur'anic verses. They offer three arguments to prove their point: other Qur'anic verses,

the sermon of 'Umar banning *mut'a*, and *hadith* of the Prophet transmitted by the Companions. The Shi'i in turn reject each of the arguments.

1. *The Qur'anic Argument*

The Sunnis argue that sexual intercourse is forbidden except with one's wife or a slave by reason of the verse: 'Prosperous are the believers ... who guard their private parts save from their wives and what their right hands own.' (23:1-6) [7] According to the Prophet's wife 'A'isha and others: ' *Mut'a* is forbidden and abrogated in the Qur'an where God says: "who guard their private parts. .." [8]

The Sunni argument continues by pointing out that without question a woman enjoyed through *muta* is not a slave. Nor is she a wife, for several reasons: If she were a wife, she and her husband would inherit from each other, since God says: ' And for you a half of what your wives leave. ..'. (4:12). But everyone agrees that *mut'a* does not involve inheritance. If she were a wife, the child would belong to the husband, since according to the Prophet: 'The child belongs to the bed.' But again this is not the case. And finally, if she were a wife, it would be necessary for her to maintain the waiting period, since this is commanded by God (2:234); but this also is not the case.

We have already seen that some of these arguments, taken from al-Razi's *Great Commentary*, do not in fact apply to *mut'a* as the Shi'is understand it. However this may be, it will be useful to see how the Shi'is answer each of the Sunni claims:

As for the 'abrogation' of the verse concerning *mut'a*, historical considerations show that this cannot be the case. The verse mentioned as abrogating *mut'a* was revealed in Mecca, while the verse establishing it was revealed after the Prophet had emigrated to Medina. But a verse which abrogates another verse must be revealed after it, not before it. [9]

As for the Sunni claim that a wife by *mut'a* is not a legitimate wife because she does not fulfill the *shari* requirements for being a 'wife', this also is false. In the question of inheritance, the Qur'anic verse is a general one, and there is no reason to suppose that it may not have certain exceptions. In fact, the specific requirements of *mut'a* as established by the *hadith* literature show that *mut'a* is an exception. Nor is it the only exception, since an unbeliever cannot inherit from a Muslim, nor can a murderer inherit from his victim. In short, inheritance pertains to permanent marriage, but even in permanent marriage it has certain exceptions, so that the verse establishing it cannot be interpreted as nullifying *mut'a's* validity. [10]

In the question of the child, there is no reason to claim that it is illegitimate. In *mut'a* the 'bed' is legitimate, so the offspring is also legitimate.[11] The Imam Ja'far was asked: 'If the wife becomes pregnant as a result of *mut'a*, to whom does the child belong?' He replied: 'To the

father', [12] i.e., the child is legitimate.

In a similar manner numerous *hadith* exist to prove that a wife by *mut'a* must observe the waiting period. Some of these are even related in Sunni sources. For example al-Razi himself quotes a relevant saying from Ibn 'Abbas. He was asked: 'Is *mut'a* fornication or marriage?' He answered: 'Neither the one nor the other.' The questioner then asked: 'Well then, what is it?' Ibn 'Abbas replied: 'It is *mut'a',* just as God has said.' The questioner continued: 'Is there a waiting period in *mut'a?'* He replied: 'Yes, a menstrual period.' 'Do the husband and wife inherit from each other?' He answered: 'NO.' [13]

Certain Sunnis also argue that *mut'a* cannot be considered a legitimate form of sexual union because it excludes such things as inheritance, divorce, sworn allegation, forswearing, and *zihar.* Since these necessary concomitants of marriage do not apply to *mut'a*, it cannot be considered marriage, so the woman cannot be considered a legitimate wife. If she is neither a wife nor property, sexual intercourse with her is illegitimate: 'Prosperous are the believers, who. ..guard their private parts, save from their wives and what their right hands own. ..; but whosoever seeks after more than that, those are the transgressors' (23:1-7). Hence, persons who engage in *mut'a* transgress God's law.

A typical Shi'i answer to this argument runs as follows: First, the Qur'anic verse is a general statement, and there is no reason why its specific applications may not be clarified by other verses and *hadith.* Second, it is not true that the above things are concomitants of marriage: there is no inheritance in the case of a non-Muslim wife, a murderer, or a slave-girl. A legitimate sexual relationship may be dissolved without divorce in the case of a wife who is the subject of a sworn allegation, a spouse who leaves Islam, or a slave-girl who is sold. Sworn allegation, forswearing, and *zihar* are all concomitants of *permanent marriage,* not of legitimate sexual relationships in general (i.e., they do not apply to sexual relationships with a slave). If we suppose that some proof is found-in the form of a Qur'anic verse or a *hadith-demonstrating* that these things do in fact pertain to legitimate sexual relationships, then it will be necessary to specify that there are certain exceptions. This is the only way we will be able to combine the Qur'anic verses and the *hadith* which show that these pertain to legitimate sexual relationships with those *hadith* which demonstrate that they do not pertain to *mut'a.* [14]

2. *The Sermon of* 'Umar

In a famous sermon [15] the second caliph 'Umar banned *mut'a* with the following words: 'Two *mut'a* were practiced during the time of the Prophet [i.e. temporary marriage and *mutat al-hajj],* [16] but I forbid both of them and will punish anyone who practices either.' Al-Razi summarizes the Sunni interpretation of 'Umar's words by saying that they were pronounced in a gathering of Companions and no one protested. Therefore, the situation must have been as follows: either (1) everyone knew that *mut'a* was forbidden, so they remained silent; or (2)

they all knew that it was permitted, yet they remained silent out of negligence and in order to placate 'Umar; or (3) they did not know whether it was forbidden or permitted, so they remained silent since the matter had just then been clarified for them, so they had no reason to protest. [17]

Al-Razi continues by saying that the first possibility is what he is trying to prove. If we maintain the second possibility, then we must call 'Umar and the Companions who were with him unbelievers. For they knew that the Qur'an and the Prophet had permitted *mut'a,* yet 'Umar went ahead and banned it without the Qur'anic verse permitting it having been abrogated. This is unbelief *(kufr);* and those who knew 'Umar was wrong without protesting shared in his unbelief. But such a supposition requires that we call Islam a religion of unbelief, which is absurd.

The third possibility-that 'Umar's listeners had not known whether *mut'a* was permitted or forbidden-is also absurd. For, if we suppose that *mut'a* was permitted, then people would need to have knowledge of that fact in their everyday lives, just as they need to have knowledge about the permissibility of marriage. So *mut'a's* legal situation must have been known, just as everyone knew about mamage.

Al-Razi concludes that as soon as we see that the second and third possibilities are in fact absurd, then we know for certain that the Companions remained silent only because they all knew that *mut'a* had already been abrogated.

The Shi'is answer al-Razi's arguments as follows: [18] 'Umar's sermon demonstrates that during the lifetime of the Prophet *mut'a* was permitted. The reason 'Umar attributed the banning to himself is that he wanted to show that he was expressing his own view. If

the Prophet himself had prohibited *mut'a,* or if its permissibility pertained only to a specific period in time, then 'Umar would have attributed its prohibition to the Prophet, not to himself.

Another saying concerning *muta* is also attributed to 'Umar: 'God permitted for His Prophet what He willed, and the Qur'an has been revealed in its entirety. So complete the *hajj* and the *'umra* as God has commanded you. But avoid marrying these women, and do not bring before me any man who has married a woman for a specified period, or I will stone him.' [19] The Shi'i *ulama'* point out that without question stoning as a punishment for having performed *mut'a* could not be permissible, even if we were to accept that *mut'a* is forbidden. For stoning can only be a punishment when a man has committed fornication with a married woman. Hence 'Umar had no basis for laying down this statute. [20]

Al-Razi answers this line of reasoning by saying that perhaps 'Umar only mentioned stoning to intimidate his listeners and make them think more seriously about the consequences of temporary marriage. Certainly such intimidation is permissible. The Prophet himself said: 'If

anyone from among us fails to pay his alms *(zakat)*, I will take it from him along with part of his property. ' But it is not permissible in Islam to take a part of someone's property in punishment for not paying his alms. The Prophet only said these words to press his point and to frighten his listeners. [21]

Concerning 'Umar's two sayings banning *mut'a,* the Shi'is argue as follows: [22] If his prohibition was based on 'independent judgment' *(ijtihad),*[23] then it is baseless, since all *ulama'* agree that independent judgment can never gainsay the Qur'an or the *hadith.* As for the Qur'anic basis of *muta,* we have already seen that-as far as the Shi'is and certain individual Sunnis are concerned-the Qur'an permits it in the chapter on Women, verse 23. As for its basis in the prophetic *hadith,* many traditions have been related in the standard Sunni collections, such as the words of 'Umar himself in his sermon: 'Two *mut'as* were practiced during the time of the Prophet. ..'.

Concerning 'Umar's 'independent judgment', one of the contemporary *Shi'i ulama'* argues as follows: ' Umar may have made his judgment completely on his own initiative and in direct contradiction to the words of the Prophet; or he may have based his judgment on a prohibition issued by the Prophet himself. If the first case is true, then 'Umar's judgment is groundless, as noted above. And the second case cannot be true, since a number of the Companions have given witness to the fact that *mut'a* was permitted during the lifetime of the Prophet and up until the time of his death. [24]

In general the Shi'is argue that if 'Umar's prohibition had been based upon the words of the Prophet, then other Companions would have known about it. How is it possible for the Prophet to have forbidden *mut'a,* yet, during the rest of his life, the period of Abu Bakr's caliphate and the beginning of 'Umar's caliphate, for prohibition to have remained unknown to everyone but 'Umar? Moreover, if his prohibition were based upon the words of the Prophet, why did he not attribute it to him instead of to himself? [25]

Al-Razi answers these arguments by claiming that none of them disproves his original contention. None of them proves that *mut'a* had not already been abrogated when 'Umar made his sermon. Moreover, there remains the question of the transmission of the *hadith* abrogating *mut'a* : Was 'Umar the only person to have heard the Prophet ban it, or had others heard him as well? Perhaps some of the Companions had heard the prohibition from the Prophet and had then forgotten. But when 'Umar mentioned the prohibition in a large gathering, everyone knew he was speaking the truth, so they remained silent. [26]

As for the fact that 'Umar attributes the prohibition to himself, al-Razi answers by pointing to his earlier argument: If 'Umar meant: ' *Mut'a* has been permitted by the *shari'a* up until now, but now I have banned it', then it becomes necessary for us to consider not only him, but also everyone who heard his pronouncement and did not protest, as an unbeliever. It becomes necessary to consider even the Imam of the Shi'is, 'Ali, as an unbeliever, since he was present

and remained silent. But no one wants to make such a claim. Hence we can only conclude that what 'Umar meant was ... *Mut'a* was permitted during the time of the Prophet, but I have forbidden it, since I know for certain-as you know-that the Prophet abrogated it.'

The Shi'is reply to al-Razi's arguments as follows: First, it is impossible to imagine that all of the Companions other than' Umar had forgotten that *muta* had been forbidden, considering its everyday importance. People need legitimate sexual relationships almost as much as they need food and water. Second, the fact that no one protested against 'Umar's pronouncement cannot be considered proof that the Prophet himself had forbidden *mut'a*. For 'Umar threatened the people with stoning, and considering his fabled severity, no one would have dared to speak against him. If 'Ali had been able to protest against 'Umar, he would not have remained because of the circumstances he had no choice but to have patience and to bide his time. The case *of mut'a* is similar. For was it not 'Ali who said: 'If 'Umar had not prohibited *mut'a*, no one would commit fornication except the wretched'? [27]

Shi'i authors also point out that 'Umar banned the two kinds of *muta* together, whereas everyone-Sunnis and Shi'is-agree that the *hajj al-mut'a* is permissible. Hence the *muta* pertaining to women should also be permissible. [28]

Finally, another Sunni view on this subject deserves mention: Other *hadith* are recorded in reliable sources according to which 'Umar does attribute the banning of *muta* to the Prophet and not to himself. So it is probable that here we do not have an exact quotation of his words, but a paraphrase. Even if we accept the Shi'i claim that these are truly 'Umar's exact words, then it is clear that by his words: 'I forbid them both', he meant: 'I am clarifying their situation for you; or: 'I am putting into practice the view of the Prophet.' For it is well known in the science of jurisprudence that prohibition and permissibility are often attributed to him who clarifies the statute. Thus, for example, when it is said that Shafi'i forbids *hadith* but Abu Hanifa permits it, no one imagines that Shafi'i and Abu Hanifa are establishing these injunctions as their own. What is meant is that they are explaining the injunction on the basis of their own understanding of the Qur'an, the *sunna*, etc. [29]

3. *The* Hadith *Transmitted by the Companions*

In Sunni sources *hadith* have been transmitted from the Prophet showing that he banned *mut'a* during his lifetime. In most of the Sunni 'sound collections' *(sihah*), it is related from 'Ali that he said: 'Verily the Prophet of God banned the *mut'a* of temporary marriage and the eating of the meat of domesticated asses.' [30] In many of these sources, and in Shi'i sources as well, the words: 'on the day of the Battle of Khaybar' are added. The Shi'i report that the great Shi'i *ulama'* such as al-Shaykh al Tusi considered this saying authentic but maintained that 'Ali was practicing *taqiyya* or 'dissimulation' when he uttered it-i.e., he was hiding the true situation in order to protect himself. [31]

Ibn Sabra relates from his father the following: 'I came upon the Prophet of God in the early morning ... leaning against the Ka'ba. He said: "Oh People! I commanded you to 'seek enjoyment' *(istimta')* from these women, but now God has forbidden that to you until the Day of Resurrection. So if you have a temporary wife, let her go her way; and do not take back anything of what you have given her." ' [32]

Another *hadith* is related from Salma b. al-Akwa'. Through his father he reported that the Prophet of God permitted *mut'a* in the year of *Awtas* (8/629) for three days; but then he prohibited it. This particular *hadith* is related in many sources, with many discrepancies in the text. [33]

For their part, the Shi'is do not consider these three *hadith* to have any authority. To illustrate how they reject them, we can summarize al-Khuis arguments: [34] The *hadith* attributed to 'Ali cannot be authentic, since all Muslims agree that *mut'a* was permitted in the year Mecca was conquered. So how could 'Ali have claimed that *muta* was banned on the Day of Khaybar (three years before Mecca's conquest)? Because of this obvious discrepancy, some of the great Sunni authorities on *hadith* have maintained that the words 'on the day of Khaybar' probably refer only to the meat of domestic asses. But this is absurd, for two reasons: First, it is counter to the rules of Arabic grammar: if the phrase referred only to asses, the verb would have to be repeated. Thus, in Arabic one says: 'I honored Zayd and 'Amr on Friday', or one says: 'I honored Zayd *and I honored* 'Amr on Friday', thus making it clear that 'on Friday' refers only to 'Amr. If the adverbial phrase referred only to the meat, the text of the *hadith* would have to read: 'Verily the Prophet of God banned *muta*, and he banned the eating of the meat of domesticated asses on the Day of Khaybar .' In short, since everyone agrees that *mut'a* was permitted when Mecca was taken, the Prophet cannot have banned it three years before that. Hence the *hadith* is not authentic.

The second reason that the 'Day of Khaybar' cannot refer only to the meat of domesticated asses is that this clearly conflicts with *hadith* related by al-Bukhari, Muslim, and Ahmad b. Hanbal (three of the most authoritative Sunni collections). For their versions of 'Ali's *hadith* is as follows: 'The Prophet banned the *mut'a* of marriage on the Day of Khaybar, as well as the meat of domesticated asses. ,

As for the *hadith* related by Ibn Sabra from his father, alKhu'i points out that although his *hadith* has been related by many chains of authority, they all go back to Ibn Sabra himself, and thus the *hadith* is of the type known as *'wahid*, i.e., it derives from a single Companion. And a Qur'anic verse cannot be abrogated even by the most authentic kind of *hadith*, much less by a relatively weak one. Moreover the very content of the *hadith* shows that it is not correct. It is hardly conceivable that the Prophet could have stood before the Ka'ba in front of a large group of Muslims and ban something until the Day of Resurrection, and that then only one person-Sabra-should have heard him or related his words. Where were those Companions who recorded even the gestures and the glances of the Prophet? Certainly they should have

joined Sabra in reporting the prohibition of *muta* until the Day of Resurrection. And where was 'Umar himself? He certainly should have known about the prohibition so that it would not have been necessary to attribute the banning of *mut'a* to himself. Finally, there are discrepancies in the various versions of Sabra's *hadith.* In some versions the prohibition is said to have occurred in the year of Mecca (8/630), in others in the year of the Farewell Pilgrimage (10/632). This discrepancy makes the *hadith* even more untrustworthy.

Al-Shahid al Thani alludes to another point concerning Ibn Sabra's *hadith* not mentioned by al-Khu'i: Ibn Sabra himself is the only source for his father's words, but no one knows anything about him. He is not mentioned in any of the books on *hadith* as a transmitter, nor has any other *hadith* been related from him. For this reason al-Bukhari-the most famous Sunni authority, and generally considered the most reliable-left Ibn Sabra's *hadith* out of his collection. [35]

As for the *hadith* of Salma b. al-Akwa', al-Khu'i remarks that again it is a saying related from only one Companion *(wahid)* and cannot abrogate a Qur'anic verse. In addition, if it is an authentic *hadith,* it is strange that it remained unknown to such important Companions as Ibn 'Abbas, Ibn Mas'ud, and Jabir b. 'Abd Allah. How is it possible for the *hadith* to be authentic, while Abu Bakr did not forbid *mut'a* during the whole period of his caliphate and 'Umar only banned it towards the end of his own? [36]

There are many sayings of the Shi'i Imams and the Companions which indicate that *mut'a* was permitted up until the time of 'Umar's prohibition. Three of the most famous are those of 'Ali, Ibn 'Abbas, and 'Umran b. al-Hasin. As we have already seen, 'Ali said: 'If 'Umar had not prohibited *mut'a,* no one would commit fornication except the wretched.' [37] This is the most famous form of a saying reported in numerous sources and a number of different versions. [38] The above version is derived from Sunni works; a Shi'i version is related from the fifth Imam, al-Baqir: 'If it were not for that [i.e., *mut'a]* with which ['Umar] b. al-Khattab preceded me, no one would commit adultery except the wretched.'

The saying related from Ibn 'Abbas is reported by the tenth/sixteenth century Sunni scholar al-Suyuti in this form: 'God have mercy on 'Umar! *Mut'a* was naught but a mercy from God, through which He showed mercy to Muhammad's community. If 'Umar had not banned it, no one would need fornication except the wretched.' [39]

The saying of 'Umran b. al-Hasin is as follows: ' *Mut'a* was permitted by the Book of God, and we practiced it while the Prophet was alive. No verse was revealed abrogating it, and the Prophet did not ban it before he died.' Some sources, including the *Sahih* of Muslim, then add the sentence: 'Then a man ['Umar] said what he wanted to according to his own opinion.' [40]

Another saying pointed to by the Shi'is is related from Jabir b. 'Abd Allah in Muslim's *Sahih*: 'Jabir came [to Mecca] for the *'umra,* so we went to see him where he was staying. He was

asked about many things, and then *mut'a* was mentioned. He said: 'Yes, we practiced *mut'a* at the time of the Messenger of God, Abu Bakr, and 'Umar.' [41]

For their part, the Sunnis do not accept these traditions as proving the Shi'i points. The Sunnis consider the saying of Ibn 'Abbas the most important and center most of their arguments around it. They quote other sayings from Ibn 'Abbas on the same subject as proof of their own contention. Al-Razi relates that poems were composed celebrating Ibn 'Abbas as the authority for the permissibility of *mut'a*. Having heard of these verses, Ibn 'Abbas said: 'God slay them! I never said that it was permitted unconditionally, but only to him who has no choice, just as [when a person has no choice] carrion, blood, and pork are permitted.' [42]

Another saying is related from Ibn 'Abbas declaring that the Qur'anic verse permitting *mut'a* was abrogated by the verse concerning divorce (65:1). In addition, on his deathbed he is reported to have said: 'Oh God, I repent to Thee of what I have said concerning *mut'a. ..*'.

In answer to the *hadi'th* of 'Ali, al-Razi relates the other saying attributed to him referred to above; but he has nothing to say about the other two traditions mentioned by the Shi'is.

Arguments Derived From The *Hadith*

The Sunni argument for the prohibition of *mut'a* based upon the *hadith* can be summarized as follows: [43] The reason that the *ulama'* have differed concerning *mut'a* is that it was permitted and then banned a number of times. In the *Sahih* of Muslim (IV, p.130) the following is related from one of the Companions: 'We were fighting in a battle alongside the Messenger of God, and our wives were not with us. We asked him: 'May we emasculate *(istikhsa')* ourselves?' He forbade us to do so and gave us permission to marry women for a period of time in exchange for an item of clothing.

Abu Hatim al-Busti, a well-known compiler of *hadith,* remarks in his *Sahih* that the question the Companions asked the Prophet shows that at first *mut'a* was forbidden, and hence the questioners saw no escape from their sexual desires but emasculation. Likewise, the Prophet's answer is meaningless unless *mut'a* had been forbidden up until that time. Then in the year of the battle of Badr (2/624) he forbade it; again, when Mecca was conquered (8/630) he allowed it, but only for a period of three days. Then he forbade it until the Day of Resurrection.

Ibn al-'Arabi (d. 638/1240), the famous Sufi, wrote voluminously on the meaning of the *sharf'a*. He calls *mut'a* one of the most remarkable statutes in Islamic law, since it was permitted at the beginning of Islam, then forbidden at the Battle of Khaybar, then permitted again at the war of Awtas. Finally it was forbidden and remained forbidden. No other statute in Islam was changed a number of times with the exception of the *qibla* (the direction of prayer), for that was abrogated twice before being finalized.

Al-Qurtubi reports that other authorities who have studied the traditions concerning *mut'a* say that its statute was changed seven times. He refers to Muslim's *Sahih* as the source for several authentic *hadith* explaining how the situation of *mut'a* was changed (most of these have been quoted above). Other *hadith* are quoted in other sources, such as the *Sunan* of Abu Dawud.

Al-Qurtubi quotes Abu Ja'far al Tahawi to the effect that none of the *hadith* which are quoted as referring to the permissibility of *mut'a* in unconditional terms are in fact unconditional, since they specify that *mut'a* was permitted only during journeys. The Prophet's last prohibition of *mut'a,* which took place after the conquest of Mecca, embraced all the previous occasions on which *mut'a* was permitted. None of the transmitters of *hadi'th* say that the Prophet permitted *mut'a* while he and his Companions were together in their homes and not travelling.

As for the *hadith* of Sabra, which states that the Prophet permitted *mut'a* at the Farewell Pilgrimage in the year 10/632, al Tahawi acknowledges that this is not in keeping with the other *hadi'th.* But having investigated all the traditions in this regard, he has found that another *hadi'th* almost identical to that of Sabra, but related by 'Abd al-'Aziz, places this occasion at the conquest of Mecca, when the men complained of separation from their wives and the Prophet gave them permission to practice *mut'a.* They could not have complained of such separation during the Farewell Pilgrimage, since all of the wives were present, and the single men could have taken permanent wives in Mecca. So the special situation that existed during the other journeys and battles was lacking. However, it is possible that the date of Sabra 's *hadi'th* is correct; in this case we can explain the situation as follows: Since the Prophet usually permitted *mut'a* during journeys away from Medina, in this case also he permitted it; but then he banned it for the final time wanting all the Muslims to know about it, for all of them were present for the Farewell Pilgrimage. There is also the fact that the Meccans were in the habit of practicing *mut'a* widely. Thus the Prophet banned *mut'a* in Mecca so that they would understand that they could not continue in their former custom,

The Shi'i answer to the Sunni argument on the basis of *hadi'th* can be summarized as follows: [44] The *hadi'th* demonstrating that *mut'a* is forbidden are in conflict with those that show it is permitted. They also conflict with *hadi'th* that show that *mut'a* continued to be permitted during the times of the Prophet, Abu Bakr, and 'Umar, up until the time that 'Umar banned it. The correct course of action is to prefer those *hadi'th* which establish its permissibility, for a number of reasons:

i. The *hadi'th* indicating *mut'a's* permissibility outnumber those which show that it is banned.

Everyone agrees that the *hadi'th* indicating that *mut'a* was permitted at certain times are authentic, but this is not the case concerning those which indicate that it was banned. Hence one can speak of a consensus *(ijma')* in the sense that all Muslims at one time agreed that *mut'a* was permitted, even though afterwards a disagreement arose. In order to chose the right course, we cannot base ourselves upon opinion but must hold fast to that concerning which we have certainty. Hence we must conclude that *mut'a* is still permitted, as long as we do not have certain knowledge to the contrary.

iii.

The *hadith* which point to the banning of *mut'a* are themselves questionable. When we realize that one of the incontestable elements of Shi'ism as established by the Imams is the permissibility of *mut'a*, then no *hadith* related from 'Ali stating that *mut'a* is forbidden can be authentic. Someone who held without question that *mut'a* is permissible would not relate a *hadith* from the Prophet that it is forbidden. On many occasions 'Ali censured 'Umar's banning of *mut'a.* His saying: 'If 'Umar had not banned *mut'a*, no one but the wretched would practice fornication' is well-known, and no one has questioned its authenticity.

Those who hold that *mut'a* is forbidden have also claimed the consensus of the Community as one of their proofs. They say that after 'Umar banned *mut'a*, all of the Prophet's Companions went along with him with the exception of Ibn 'Abbas, and he changed his opinion towards the end of his life. In answer to this claim, the Shi'is point out that 'consensus' can not be accepted as a valid proof of the banning of *mut'a;* and in any case, the very fact that the Shi'i Imams-the Household of the Prophet-who are the very pillars of Islam, have all agreed that *mut'a* is permitted shows that there was in fact no consensus. Moreover, from the first the Shi'is have agreed on the permissibility of *mut'a,* to such an extent that this view has always been singled out as one of the specific features of Shi'ism. Given this fact, to claim consensus is meaningless. In addition, as we have seen above, many of the Prophet's outstanding Companions and their followers held that *mut'a* was permitted. Finally, the claim that Ibn 'Abbas changed his view on *mut'a* toward the end of his life has never been substantiated. Even if it were to be proven, one could only claim consensus if we were certain that no one was opposed to the view that *mut'a* is forbidden; whereas we know that in fact the number of opponents was quite large. In

short, the Shi'is conclude, there is no real evidence to show that *mut'a* is not permitted; and when the *hadi'th* are investigated, the conclusion is likely to be reached that not only is it permitted *(mubah*), it is even recommended *(mustahabb*).

The Opinions Of The Four Sunny Schools Of Law [45]

The general opinion of the four Sunni schools of law concerning the reason *mut'a* was permitted and then afterwards prohibited can be summarized as follows: At the beginning of Islam, the Muslims were in the minority and were often at war. Many of them were not able to marry and raise families, since they were constantly being called upon to travel long distances and to engage in battle with the unbelievers. Moreover, they had only recently embraced Islam; formerly, they had been accustomed to the concupiscence of the pre-Islamic Arabs, who would often possess harems containing large numbers of wives. They would have sexual relationships with whichever wife they desired, and leave aside those who no longer held any interest for them. The only 'principles' involved in their sexual affairs were lust and desire. When such men became Muslims, with Islam's strict guidance for sexual relationships, it was difficult for them to spend much of their time at war with no opportunity to satisfy their sexual instincts. Hence it was natural that they be allowed to practice temporary marriage, especially since such marriages do not involve any permanent bond of the type which requires constant care and attention towards a wife and children. Nor at the time of war could the usual means of reducing sexual desires, such as fasting, be employed, since these would also reduce the fighting ability of the soldiers.

Hence we see that the reason *mut'a* was permitted was the special situation pertaining to the beginning of Islam. The *hadi'th* of Sabra related by Muslim confirms this view: 'The Messenger of God gave us permission to practice *mut'a* on the day of conquest when we entered Mecca. Then as soon as he left the city, he banned it once again.' This *hadi'th* illustrates clearly that *mut'a* was permitted due to the special circumstances connected with military expeditions.

Ibn Maja relates that the Prophet said: 'Oh people! I would give you permission to practice *mut'a*, but God has forbidden it until the Day of Resurrection.' When we look at the status and rules of Islam in general we see that *mut'a's* prohibition is in keeping with Islam. For fornication and adultery are looked upon as a heinous form of sin and necessitate a terrible punishment. Islam forbids anything which would tend towards obscurity and make it easy to commit detestable acts. The Qur'an states: ' Approach not fornication; surely, it is indecency, and evil as a way' (17:32). And according to the Prophet: 'No one is a believer in the act of fornication.' Fornication is considered a sin in Islam for many reasons, but certainly these are sufficient: It results in the destruction of human dignity, the mixing of lineage and kinship, and the loss of modesty. But Islam came to eliminate such things and to a large degree was successful in extirpating all despicable acts. Considering the high level of humanity and outstanding moral qualities the Muslims achieved, it is not reasonable to suppose that temporary marriage should be permitted.

The four Sunni schools of law all agree that temporary marriage is invalid. That which invalidates the contract is the stipulation of a time period. If such a marriage takes place, it

must be annulled, and if it is consummated before the annulment takes place, the woman must be paid the 'normal dowry'.

The Shafi'i school adds that even if the time period stipulated by the contract should be the life-time of the husband or the wife, the contract is still invalid, since the contract of marriage requires that its effects continue after death. That is why a spouse may give his or her spouse the ritual purification of the dead before burial (otherwise, the washer of the dead must be of the same sex as the corpse). A marriage contracted with a stipulation that it comes to an end when one of the spouses dies would mean that the effects of the marriage would end at death. So such a stipulation invalidates the contract. [46]

The Hanafis add that if the time period stipulated is so long that as a rule the spouses could not remain alive until it comes to an end (e.g., if the man were to say: 'I will marry you until the hour of Resurrection '), then we can no longer call the marriage 'temporary'. In effect this stipulation means 'forever'. Hence it is nullified as a stipulation of a 'time period' and the contract is sound. If the husband's intention in contracting the marriage is to enjoy the woman 's company only for a period of time, but he does not make such a stipulation in the contract, the marriage is correct. In the same way, if a person should marry making it a condition of the contract that a divorce will take place after a certain period of time, the contract is correct but the condition is nullified, since such a condition cannot limit the contract. [47]

In any case the four schools agree that the punishment for a person who enters into a temporary marriage is not the same as that for fornication. In the latter case the punishment *(hadd)* is 100 lashes for each party in the case of an unmarried woman, and stoning to death in the case of a married woman. But the punishment for *mut'a* is defined as *ta'zi'r,* i.e., less than the full punishment for fornication, depending on circumstances and the opinion of the judge. The penalty for fornication is not exacted because certain doubts remain concerning the status of *mut'a* as a result of the *hadi'th* of Ibn 'Abbas.

The Shi'i Juridical Argument

The Shi'is have always considered *mut'a* to be of special importance and have tried to keep it alive as an institution of Islamic society. Shi'i law is often referred to as the 'Ja'fari school of law', since in reality the sixth Imam, Ja'far al-Sadiq, is its founder. Hence it is appropriate to quote a few of his many sayings concerning *mut'a,* such as: ' *Mut'a* was approved by the text of the Qur'an and became part of the *sunna* of the Prophet,' [48] Imam Ja'far considered the Qur'anic verse referred to above (4:24) the basis for mut'a, He said: 'The verse proves mut'a's permissibility. ' [49]

Once Abu Hanlfa, the founder of one of the four Sunni schools of law and a student of the Imam Ja'far, asked the Imam about *mut'a,* He replied: 'Which of the two *mut'as* do you mean?' Abu Hanifa answered: 'I have already asked you about the *mut'a* of the *hajj,* So tell me about

the *mut'a* of marriage.' The Imam said, 'Glory be to God! Have you not read the Qur'an? "So those of them whom you enjoy, give to them their appointed wages" (4:24).' [50]

Someone asked the Imam Ja'far: 'Why is it that four witnesses are necessary [for proof to be established] in cases of adultery, but two are sufficient in the case of murder?' He replied: 'God made *mut'a* permissible for you, but He knew that you would not approve of it. So He made the witnesses to number four as a protection for you. If it were not for that, it would be brought against you [that you are committing fornication, whereas you are in fact practicing *mut'a*]. But seldom do four witnesses come together on a single matter.' [51]

The Imam Ja'far considered *mut'a* a divine mercy by means of which people were saved from the sin of fornication and delivered from God's retribution. Concerning the Qur'anic verse: 'Whatsoever mercy God opens to men, none can withhold' (35:2) the Imam said: ' *Mut'a* is part of that mercy.' [52]

The Imam Ja'far said: 'I do not like a man to leave this world without having married temporarily, even if only on one occasion.' [53]

The Imam Ja'far said: 'It is reprehensible in my eyes that a man should die while there yet remains a practice of the Messenger of God that he has not adopted.' He was asked: 'And did the Messenger of God practice *mut'a?'* He replied: 'Yes.' Then he recited the Qur'anic verse: ' And when the Prophet confided to one of his wives a certain matter' up to the words 'and virgins too.' (66:3-5) [54]

The Shi'is call Abu Ja'far Muhammad al Tusi (d. 460/1068) the 'Elder of the Denomination' *(Shaykh al-ta'ifa),* since he is the founder of Shi'i demonstrative jurisprudence *(al-fiqh al-istidlali);* in other words, he was the first person to give Shi'i law a systematic basis. We can conclude this chapter with a summary of his views on *mut'a*. He writes that the Shi'i reasons for considering *mut'a* permissible are as follows: [55]

1. The consensus of the Shi'i community.

2. The words of the Qur'an: 'Marry such women as seem good to you!' (4:3), since *mut'a* is a kind of marriage, but one which men desire to perform by expending their property.

3.

The words of the Qur'an: 'So those of them whom you enjoy, give to them their appointed wages' (4:24). The word *istimta'* (enjoy), unless otherwise qualified, signifies 'temporary marriage.'

4.

Ibn Mas'ud's version of the Qur'an, which adds the words 'to a specified term ' to the above verse.

5.

There is no disagreement over the fact that *mut'a* was allowed at the beginning of Islam. So those who claim that the verse was abrogated must prove their assertion.

6.

The principle from which discussion must begin is that *mut'a* is permitted. That it should be forbidden must be proven.

7.

The words of 'Umar concerning the 'two *mut'as'*. Here 'Umar tells us that at the time of the Prophet, *mut'a* was permitted, i.e., that it was a part of the religion of Islam. Proof must be provided that it is no longer so.

After referring to these seven reasons, al Tusi answers the arguments of those who claim *mut'a* is forbidden in much the same way that we have seen above.

Footnotes:

[1]. *Sharh al-lum'a,* v, 248-53, Note; *Jawahir,* v, 163.

[2]. Muhammad Husayn Tabataba'i (d. 1982), *Tafsir al-mizan,* Beirut, 1974; Persian translation by Muhammad Khatima, VIII, Qum, *1344/1965,* 76.

[3]. Ibid., 84.

[4]. Abu 'Ali al-Fadl b. al-Hasan al Tabarsi (d. 548/1153), *Majma' al-bayan,* Tehran, 1339/1960, III, 32.

[5]. Ibid.

[6]. *Al Tafsir al-kabir,* Istanbul, 1307 / 1889-90, III, 286.

[7]. Ibid.,287.

[8]. Muhammad b. Ahmad b. Abi Bakr al-Ansari al-Qurtubi (d. 671/1273), *al-Jami' li ahkam al-Qur'an,* Cairo, 1967 , v, 130.

[9]. *Tafsir al-mizan,* Persian version, VIII, 132; Husayn Yusuf Makki, *al-Mut'a fi'l-Islam,* Persian translation, Tehran, *1342/1963,* p.59.

[10]. Abu'I-Qasim al-Musawi al-Khu'i, *al-Bayan fi tafsir al-Qur'an,* Najaf, *1375/1955-56,* 219.

[11]. *Sharh al-lum'a,* v, 277, Note.

[12]. *Wasa'il,* XIV, 488, *hadith* I.

[13]. *Al-Tafsir al-kabir*,III, 286.

[14]. *Jawahir,* v, 163.

[15]. Ahmad b.Hanbal, *al-Musnad,* Beirut, n.d., 1,52.

[16]. Pilgrims who come to Mecca for the *hajj* from a long distance and want to perform the *'umra* before the *hajj* are allowed to enter into a state of consecration *(ihram)* for the *'umra* and then to leave it until they re-enter it for the *hajj.* During the intervening period they can 'enjoy themselves' *(tamattu')* with the activities of everyday life that are forbidden in the state of *ihram.* This *tamattu'* before the *hajj* is known as *mut'at al-hajj.*

[17]. *Al Tafsir al-kabir,* III, 287.

[18]. *Majma' al-bayan,* III, 32.

[19]. Muslim, *al-Sahih,* Cairo, 1334/1916, IV, 38 (chapter: *al-mut'a bi 'l-hajj wa 'l- 'umra).*

[20]. *Jawahir,* V, 161; *al-Bayan,* 229.

[21]. *Al-Tafsir al-kabir,*III, 287.

[22]. *Sharh al-lum'a,* V, 182-83; *Jawahir,* v, 161; *al-Bayan,229.*

[23]. Those who have attained the capacity and necessary knowledge of jurisprudence to make independent judgments *(ijtihad)* on cases concerning which they are consulted are called *mujtahids.* In contrast to Shi'i law, in Sunnism the 'door of *ijtihad'* has been closed.

[24]. *Al-Bayan,229.*

[25]. *Sharh al-lum'a,* v, 283; *al-Bayan,* p.229; *al-Mut'a,* 68.

[26]. *Al Tafsir al-kabir,* III, 290.

[27]. *Al-Mut'a,* pp.68-69.

[28]. *Majma' al-bayan,* III, 33.

[29]. Muhammad Shaykh al-Islam Kurdistani, *Rahnama-yi madhhab-i Shafi'i,* Tehran, *1337/1958,* I,429-30.

[30]. *Al Tafsir al-kabir,* III, 287-88.

[31]. *Wasa'il,* IV, 441, *hadith* 32.

[32]. *Al Tafsir al-kabir,* III, 288.

[33]. Ibid.; *al-Jami',* V, 131; *al-Bayan,* p.244; *al-Mut'a,* pp.19-20.

[34]. *Al-Bayan,* pp.222-24.

[35]. *Sharh al-lum'a,* v, 264-82, Note; 282, Text.

[36]. *Al-Bayan,* pp.222-23.

[37]. *Al Tafsir al-kabir,* III, 287.

[38]. *Wasa'il,* XIV, 436, *hadith* 2; 440, *hadith* 20 and 25.

[39]. *Al-Durr al-manlhur,Tehran, 1377/1957,* II, 141.

[40]. *Al-Bayan,* p.221; *al-Tafsir al-kabir,* III, 286; Ahmad b. Hanbal, *al-Musnad,* VI, 436; Muslim, IV, 48.

[41]. Muslim, IV, 131.

[42]. *Al Tafsir al-kabir,* III, 286.

[43]. *Al-Jami',* V, 130-32.

[44]. *Jawahir,* v, 162-63.

[45]. *Fiqh,* IV, 90-92.

[46]. Ibid.,92.

[47]. Ibid.,93-94.

[48]. *Wasa'il,* XIV, 437, *hadith* 5.

[49]. Ibid., 439, *had'ith* 19.

[50]. Ibid., 437, *hadith* 6.

[51]. Ibid., 439, *hadith* 14.

[52]. Ibid., *hadith* 18.

[53]. Ibid., 444, *hadith* 13.

[54]. Ibid., 442, *hadith* 1.

[55]. Abu Ja'far Muhammad b. al-Hasan al Tusi, Shaykh al Ta'ifa, (d. *460/1068), al-Khilaf,* Tehran, *1372/1952-53,* 11, 179-80.